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FOREWORD

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FOREWORD

Although the late war did not compel Albany Law School to suspend its operations, the emergency which it created, with its multifold shortages, disturbances, tensions, and pressures, was hardly conducive to the continued publication of the intramural Albany Law Review. The Review, with its life blood being drained away by the Selective Training and Service Act, bowed to the inevitable and retired, presumably within the Law School vault, until such time as it might be revived and reinvigorated. Its editorial rooms became, in turn, a storeroom, a rendezvous for students, and a faculty office. V-J day came and passed into history, but accelerated courses, heavy study and teaching loads, and a general reorganization of the school retarded the resumption of law review activity.

Now, after six years, some degree of normalcy appears in prospect, and the termination of acceleration leaves time for scholarly pursuits. It has been decided to revive the Review and re-establish it as a basic part of the school's program. This decision was by no means an inevitable one. It is based upon an assumption that the type of activity involved in creating an issue of the Review furnishes invaluable training in legal scholarship, thereby enlarging the scope of the School's contribution to legal education. The beneficial influence of the Review should, and must, extend beyond its board to the student body and, as much as possible, to the legal community which the Law School serves.

This Review is really an experimental operation. Although its physical format is a departure from the past, its substance is traditional law review material. The editorial board, confronted with loss of continuity and lack of precedent, has been forced to face and resolve many problems. This they have done quite resourcefully, setting up the necessary administrative machinery and getting the project under way. The present issue reflects only a small part of the work and preparation it represents. Its adherence to traditional form and content does not reflect the plans already made for its future. The important point, for the present, is that the Review has come to life. Growth and development will follow.

R.D.S.

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SIGNIFICANT CHANGES MADE BY THE REVENUE ACT OF 1948 [1]

By ISIDOR SACK*

The Revenue Act of 1948 represents, as the Senate Committee on Finance [2] expresses it, the adoption of a "new national system" for ascertaining federal tax liability for income, estate and gift taxes. It brings about the geographic equalization of these taxes and is designed to correct inequalities in treatment accorded to the residents of states using the community property system and those residing in common law states.

Background note—comments on the community property system:

The Revenue Act of 1948 has been hailed as correcting the inequities in the federal tax system created by the existence of the "community property" system in twelve states and it has indeed done so. A brief summary of the principal community property provisions and the tax consequences flowing therefrom may therefor be in order.

The community property system is an "old Spanish custom" which was introduced by the Spanish and French inhabitants of the territories which later became the states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington, and the system was incorporated in the laws (and in some cases the constitution) of these territories when they became states of the Union. The system was firmly estab-

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[1] This article is not designed as a complete analysis of all the provisions of the Revenue Act of 1948 as that would be premature and too lengthy. It deals only with the principal changes and with those affecting residents of the common law states. The special provisions affecting residents of community property states are not discussed.

[2] Report of the Committee on Finance, 80th Congress, 2d Session, Senate Report #1013 on the Revenue Bill of 1948.

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lished in these states long before the advent of Federal income and inheritance taxes.

Broadly speaking (and there are many qualifications) the community property system provides that each spouse has an immediate vested interest in half of the community income of both spouses during marriage. Community income includes earnings from services and in some states income from property and investments. The laws of these states are not at all identical. In some states income from separate property (and that is variously defined) constitutes the separate income of the spouse owning it. In others, income from separate property accruing during marriage is community income. In *Poe v. Seaborn,* 282 U.S. 101, the Supreme Court, recognizing that rights to property are fixed by state law, decided that in a state where a wife had a vested interest in half of her husband's income, she, and not he, was subject to federal tax thereon.

Since the rates applied under the income tax are steeply progressive, the same family income divided in two halves by community property law will be taxed far less severely than in a common-law state where the whole income is earned by and taxed to one spouse. The difference is greatest when the entire income of the couple in the common-law state is received by one spouse, and when, under community-property law, none of the income is the "separate" income of either spouse.

Since the enactment of the Federal income tax law and the advantages thereunder accruing to residents of the community property states, other states have adopted the community property system primarily for the purpose of securing these advantages.[3]

The advantages accruing under the estate and gift tax laws were withdrawn in 1942 by amendments enacted in that year.

There has been considerable criticism of the inequitable results of federal taxation due to existence of the community property system in so many states. The adoption of the community property system has been widely advocated in some common law states despite the extreme difficulty of a transition from one system to another. It is now recognized that such a transition will be a period of extreme confusion during which the courts, administrative officials and legislatures will be work-

[3] These states are: Oklahoma, Michigan, Oregon, Pennsylvania and Nebraska, also the territory of Hawaii. (The Pennsylvania Law has been declared unconstitutional by the Pennsylvania Supreme Court).

ing out the detailed application of a new system of property law.[4]

The Revenue Act of 1948 is an effort to place the residents of all states on a par with respect to these three taxes; it achieves a geographic equalization, and its provisions can be better understood if this purpose is borne in mind.

It will forestall the enactment of community property legislation by common law states and is likely to bring about the repeal of this legislation in the states that have only recently adopted it, and probably have become increasingly aware of the difficulties of the transition from one system to another.

INCOME TAX

Income splitting by husbands and wives:

The objective of the Revenue Act of 1948 in equalizing the income tax burden on residents of all states is accomplished by giving husbands and wives in all states the option to split their combined income if they file joint returns. The combined net income, after the combined exemptions, is divided by 2; a tax is computed on this basis and multiplied by 2. Because of the progressive character of the surtax rates this accomplishes a substantial saving which may be as high as $24,994.95.

The new law benefits residents of community property states as well as those in common law states because in some of the community property states income from separate property was separate income and not community income.

The tax saving under a joint return of husband and wife can be illustrated by the following computation showing the tax upon net income, after deductions, of $15,000. earned by a single individual and on the same amounts earned by a married man whose wife has no separate income. (See table p. 4)

Joint returns of husband and wife:

No joint return may be made if either husband or wife was a non-resident alien at any time during the year, or if they

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[4] See report dated December 8, 1947 to Gov. Dewey by Hon. A. B. Chapman, President of the New York State Tax Commission, on the advisability of adopting a community property law in New York State.

Single Person:	
Net income	$15,000.00
Less Personal Exemption	600.00
	$14,400.00
Tentative normal and surtax	4,448.00
"Discount" ($68. plus 12% of excess over $400.)	553.76
Tax Payable	$3,894.24
Married Person:	
Net income	$15,000.00
Less personal exemption for self and wife	1,200.00
	$13,800.00
One half thereof	6,900.00
Tentative normal and surtax	1,630.00
"Discount" ($68.—plus 12% of excess over $400.)	215.60
Tax on each half	1,414.00
Multiplied by 2	$2,828.80

have different taxable years. Otherwise the marital status at the end of the taxable year, or if one dies, at the date of death, determines the right to file a joint return. An individual is not considered married if he or she is legally separated from his spouse under a *decree* of divorce or separate maintenance. Apparently, separation under voluntary agreement does not prevent the filing of a joint return.

The liability for the payment of the tax is joint and several.

Where a joint return is made by husband and wife, capital gains and losses are combined and the combined losses are limited to the extent of the combined gains, plus the net income or $1,000., whichever is smaller.

Once a separate or a joint return is filed for any year the election is irrevocable unless the return was filed before the due date for filing, in which case the election can be changed up to that date. For example: The return for the year 1948 will be due on March 15, 1949. If separate returns are filed on January 15, 1949 they may be superseded by a joint return at any time up to March 15, 1949, but not thereafter.

The only exception to the foregoing is in the case of a deceased spouse. The executor of the deceased spouse may disaffirm a joint return filed by the surviving spouse and substitute a separate return for the decedent. This is a salutary provision to insure the executor that the tax due from his decedent has been paid and to relieve the estate from the joint and several liability for the whole tax, unless the executor decides to file a joint return or acquiesces in the joint return filed by the surviving spouse.

The death of a spouse does not prevent the filing of a joint return. If, however, the surviving spouse should remarry before the close of his or her taxable year, the joint return cannot be made with the deceased spouse but can be made with the new spouse.

Net long term capital gains are taxed at the maximum rate of 25% and the alternative method of computing tax, where the return includes net long term capital gains, is still available, and if the alternative calculation results in a lower tax that becomes the amount payable. However, where a husband and wife file a joint return their combined surtax net income will have to exceed $44,000. before there can be any saving under the alternative computation.

While there will generally be an advantage in filing a joint return under the new law, there are situations where that will not be so. In the lower income ranges some part of those deductions which are geared to income, (such as, medical expenses or net capital losses) may be lost and a computation may show a saving in filing separate returns. For example: medical expenses are limited to the excess of the actual expense over 5% of the adjusted gross income. As the adjusted gross income on a joint return may be larger than on a separate return, some of this deduction may be wasted on a joint return and filing separate returns may be indicated.

General reduction in rates:

The law reduces tax rates generally by a device that I shall call "discounts" from the tax as computed on the old rate schedule contained in the 1945 Act.

In 1946 and 1947 taxpayers received a discount of 5% from the tax as computed under this rate schedule, but the Revenue Act of 1948 substitutes for this a series of reductions as follows:

If the aggregate tax computed under the rate schedule is:	*The discount for 1948 is:*
Not over $400.	17% of the aggregate
Over $400. but not over $100,000.	$68. plus 12% of the excess over $400.
Over $100,000.	$12,020. plus 9.75% of the excess over $100,000.

While the rate schedule reaches 91% (before the discount) on incomes in excess of $200,000., there is a provision that the aggregate tax cannot exceed 77% of the net income. The net income on a return would have to reach approximately $487,500. (exclusive of long term capital gains) and twice that amount on a joint return, for this limitation to come into play. The Senate Finance Committee is quite justified in saying that this limitation is "very rarely applicable."

Increase in personal exemption:

The prior exemption of $500. for each taxpayer and each dependent has now been increased to $600. for each taxpayer and each dependent, so that husband and wife, without dependents and filing a joint return are now entitled to two exemptions of $600. each. A new additional exemption of $600. is allowed for each taxpayer who has attained the age of 65 before the end of the taxable year, and a further additional exemption of $600. for each taxpayer who is blind at the close of the taxable year. The standard of vision which constitutes one a blind person is defined in the law. These additional exemptions for persons over 65 years and for blind persons are not allowable with respect to dependents. They are allowable only for the taxpayer, and also for his spouse where a joint return is filed, or in any other case where a taxpayer is entitled to his wife's exemption.

Standard Deduction:

The standard deduction has been increased to $1,000. or 10% of the adjusted gross income, whichever is less, in the case of unmarried taxpayers and married taxpayers who file joint returns. If, however, married persons file separate returns then each can deduct only $500. or 10%, whichever is less. This

deduction is in lieu of all non-business deductions, such as charitable contributions, taxes and interest on residence property, non-business bad debts, medical expenses, etc. As in prior years, if married persons file separate returns they must both either use the standard deduction or must itemize their deductions.

Optional tax table:

The new law has amended the optional tax table which may be used where the gross income shown on the return of an individual or the joint return of a husband and wife is less than $5,000.

The tax computations give effect to the standard deduction. This table should be used with discretion. If the taxpayer's allowable deductions are in excess of the standard amount the table should not be used. Where the combined adjusted gross income of the husband and wife is $5,000. or more the table may not be used.

Declaration of Estimated Tax:

The requirement for filing a declaration of estimated tax is changed so that every individual must make a declaration, if:

(1) his gross income from *wages* can reasonably be expected to exceed $4,500. plus $600. for each exemption to which he is entitled, or

(2) his gross income from *other sources* can be expected to exceed $100. and his gross income to be $600. or more.

If an individual is over 65 years of age he will be entitled to two exemptions and if his only income is from wages, he will not be required to file a declaration unless his wages are expected to be $5,700. (the sum of $4,500. plus two exemptions of $600. each); and so on.

Withholding tax on salaries and wages:

Employers are, as before, required to withhold the tax on compensation payments. Because of the reduced rates and the additional exemptions allowed to taxpayers and their spouses who will be 65 years of age or older by the end of the year,

and the additional exemption for blind taxpayers and their spouses, new withholding schedules are provided by the law. Employers must use these for tax withholding from wage payments on or after May 1, 1948.

Because the reductions in rates and increases in exemptions are effective from January 1, 1948, there will be an over-withholding in many cases. This will be adjusted when the employees file their returns next year, at which time refunds will be due many employees. Due to the income splitting provisions of the new law, many married employees will find that the tax withheld is in excess of the tax payable, if they exercise the option to file joint returns. There is no provision in law for reducing the amount of tax withheld because of this possibility, and there seems to be no plan to introduce two different schedules for withholding. Such employees will balance their tax accounts through refund claims after their returns are filed.

Fiscal year returns:

As the changes made by this Act are effective for 1948 the law contains the usual provisions that in the case of a taxable year beginning in 1947 and ending in 1948, the taxpayer must compute his tax under a special method which takes into account the portion of the fiscal year which falls within each of the calendar years 1947 and 1948. The tax for the fiscal year is the sum of the pro-rata parts of the two tentative taxes, the first being computed under the law applicable to the calendar year 1947, and the second being computed under the law applicable to the calendar year 1948.

For 1948 the rates are lower and the exemptions are higher and married taxpayers have the option of splitting income by filing a joint return. A married man, reporting on a fiscal year basis and desiring to take advantage of the income splitting provisions for the portion of the fiscal year falling in 1948 will have to file a joint return with his wife for the entire fiscal year and therefor compute the 1947 tax on the basis of a joint return without income splitting for that year. This is not a just burden to impose upon him and it is hoped the Commissioner can find a way to avoid it. If, however, the language of the law is strictly construed and the 1947 portion of the fiscal year income must be taxed on a joint basis, in order to get the advantage of

income splitting for the 1948 portion, a computation should be made to determine whether it is advisable to file a joint return or separate returns.

Medical expenses:

The deduction continues to be limited to $1,250. for each taxpayer and $1,250. for each dependent, but the maximum limit has been increased to $5,000. in the case of a joint return of husband and wife with two dependents. As the tax on a joint return is based on reducing income and deductions by half, this amendment was necessary to achieve the geographic equalization desired by Congress.

ESTATE TAX

The new provisions relating to the estate tax apply to the estates of citizens and residents of the United States dying after December 31, 1947.

The estate and gift tax provisions of the new law have not received as much publicity as the income tax changes, but they are of great importance to any one who expects to make a gift or leave an estate large enough to be subject to federal taxes. And, of course, lawyers need know these provisions thoroughly in order to advise their clients intelligently.

The provisions are detailed and technical and require close analysis in many situations and the following are only general comments on the new law. The Act for all practical purposes treats all property owned by married persons as though it belonged half to each spouse, so that a transfer of half the property from one spouse to the other by bequest or inheritance is not a taxable transfer.

The estate tax amendments benefit the residents of community property states as well as those of common law states, as the Revenue Act of 1942 introduced provisions which taxed transfers of community property in such a way as to bring about unfair and discriminatory results. These provisions have now been repealed and the new system is applicable uniformly throughout the United States.

Marital deduction:

The congressional objective of geographic integration of the estate tax is achieved by a provision which allows a "marital deduction" in determining the amount of an estate subject to tax.

This marital deduction is allowed for any property in a decedent's estate which passes to his surviving spouse, by will or inheritance. The aggregate amount of such deduction is limited to 50% of the value of the adjusted gross estate. Thus, if out of an estate of $500,000. the sum of $250,000. (or more) is bequeathed to the wife, the amount subject to estate taxation would be only $190,000. as follows:

Adjusted gross estate	$500,000
Less marital deduction— (bequest to wife)	250,000
Net estate	250,000
Less statutory exemption	60,000
Net estate subject to tax	$190,000

In this example, if the will provided that the residue shall be divided equally between the wife and son the marital deduction would not be $250,000. as the wife would not receive that sum. Her interest would be reduced by half of the federal and estate taxes on the portion going to the son. Where the amount of the bequest and the estate tax are mutually interdependent an algebraic computation must be made to determine both amounts and the marital deduction will be limited to the amount actually passing to the wife, net after taxes.

The amount of the deduction is determined by values as of the date of the decedent's death unless the value of the gross estate is determined under the optional valuation rule (Sec. 811 (j) of the Code), as of a year later in which case the value as of such date is used.

The status of a surviving spouse is determined at the date of death. *For example:* If a man makes a bequest in his will to a person to whom he is not married when the will was drawn, but to whom he was married at the date of death, that is treated as a transfer to a spouse. A legal separation, which has not (at

the time of the decedent's death) terminated the marriage does not affect such status.

The marital deduction applies in cases where the property passes by will or inheritance, but there are many qualifications and limitations, however, some of which are discussed herein. It is allowed only with respect to property included in determining the gross estate; thus, if the surviving spouse inherits foreign real estate (not included in the value of the gross estate) no deduction will result from the passing of such interest.

The marital deduction is not allowed unless the surviving spouse receives the property outright, or if the spouse is a beneficiary of a trust and has (a) the exclusive right to all the income for life *and* (b) the sole and unrestricted right to appoint the corpus either by will or during life. She is then the virtual owner of the property. This provision is designed to allow the marital deduction for such cases where the value of the property over which the surviving spouse has the power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse. This requirement disqualifies any trust the income of which is required to be accumulated, or which may in the discretion of the trustee be accumulated.

The law denies a marital deduction for bequests of terminable interests; that is, those which will terminate upon the occurrence or failure to occur of an event or a contingency and after such termination someone other than the surviving spouse can come into possession or enjoyment of the property. A life estate is a terminable interest as is an estate for a term of years or one measured by the life of another, or an interest to a surviving spouse as long as she remains unmarried.

Section 812 (e), which provides for the marital deduction, must be studied with care in drafting wills. Terminable interests are defined very technically and the allowance of the marital deduction is subject to many conditions. The Senate Finance Committee states that it is intended to restrict the deduction to those cases where the decedent passes to his spouse all of his interest in the property. Thus, a deduction will not be allowed under the amendments if the only interest given a spouse is in property in which the decedent or donor also gave an interest to someone else who may possess or enjoy the property after the donee spouse dies. However, if the only interest the husband ever owned in the property is a terminable in-

terest, such as a lease, and he gives his wife his entire interest in the property, then the deduction is permitted. Similarly if a decedent sold for value an interest in property, retaining only an estate for years, which passes to his wife, such interest would qualify for the marital deduction.

The law is too new for a detailed discussion of its application at this time. However, attention is called to subdivision (1) (C) which deals with "interest in unidentified assets" as that seems to contain a trap through which marital deductions may inadvertently be lost. Even if a bequest to a wife is for a specific sum and unconditional, if it may be satisfied out of an asset of a decedent which is a "terminable interest" in property, the value of such interest is deducted from the bequest to the wife to determine the marital deduction. This is so even though the bequest to the wife is not in fact satisfied out of the proceeds of the sale of the terminable interest.

This is illustrated as follows by the Senate Finance Committee:

> "*Example:* The decedent bequeaths $50,000. to his surviving spouse. The general estate includes a term for years (valued at $60,000. in determining the value of the decedent's gross estate) in Blackacre—an interest retained by the decedent after a gift of Blackacre to his son. Accordingly, the marital deduction with respect to the bequest of $50,000. is reduced to zero. It is immaterial whether the surviving spouse actually receives the term for years."

Where a decedent leaves life insurance payable in installments to the surviving spouse, there will be a marital deduction for the proceeds (to the extent that they are included in the gross estate) if the surviving spouse is the sole beneficiary of all amounts payable during her life and has the sole power to appoint all amounts payable after her death.

An exception to the terminable interest rule is made to take care of the common disaster clause in wills. If a decedent provides in his will that certain property shall pass to his spouse unless she dies in a common disaster resulting in the death of the decedent, and if in fact she does not die in a common disaster, her interest is not regarded as terminable and qualifies for the marital deduction.

The marital deduction is allowed with respect to interests in property which pass to the surviving spouse from the decedent

either by the terms of the will or through intestacy. An interest in property does not pass to the surviving spouse if she or he receives it as a creditor by reason of a claim for which deduction is allowed in computing the gross estate. If the surviving spouse becomes entitled to property only because of a disclaimer by another, there will be no marital deduction for such interest. Also, if a surviving spouse disclaims an interest to which he or she may be entitled by will or law, and the property thereupon passes to another, then the marital deduction is lost with respect to such property.

The Senate Finance Committee illustrates this provision by the following example:

> "If the surviving spouse disclaims a bequest of the decedent to her and the property falls into the residue passing to other persons, no marital deduction is permitted with respect to such property. The property is considered as passing from the decedent to the residuary legatees. If, in such a case, however, the surviving spouse is the residuary legatee, the interest which she so disclaimed is considered as passing to her from the decedent (as a result of the disclaimer) for purposes of the marital deduction."

Property previously taxed:

The estate tax law allows a deduction from the gross estate of the value of property included therein, which was received by the decedent from any person who died within five years prior to his death, if it was taxed in the estate of the donor. There were substantial limitations on the deduction, but in spirit it was an effort to avoid two estate taxes on the same property within a five year span.

The new Act provides that this deduction is not allowable with respect to any property received from the decedent's spouse, if the spouse died after December 31, 1947. The deduction is disallowed regardless of whether a marital deduction was allowed in the estate of the prior decedent.

GIFT TAX

The amendments apply to all gifts made by citizens or residents of the United States after the enactment of the Revenue Act of 1948, that is after April 2, 1948.

Pursuant to the underlying concept of treating property owned by married persons as though it belonged in equal shares to each spouse, the gift tax law has been amended to provide that only half of a gift by one spouse to another is taxable and in the case of gifts by a married person to third parties, the husband and wife may elect to treat the gift as being made half by each, regardless of who made it, and regardless of whose property actually was transferred.

As in the case of the estate tax, the law accomplishes its principal purpose by a "marital deduction" which corresponds to the estate tax marital deduction, discussed above. This deduction is equal to one-half the value of any gift to the donor's spouse. It should be noted, however, that the gift tax marital deduction is limited to half the value of the gift of an interest in property; while the corresponding estate tax deduction is allowed for the entire value of an interest in property passing, but a limitation of 50% of the value of the adjusted gross estate is placed on the aggregate amount of the marital deduction under the estate tax.

As in the case of the marital deduction for estate tax purposes the gift to the spouse must be either outright or if the spouse is a beneficiary of a trust the spouse must have (a) the exclusive right to all the income for life *and* (b) the sole and unrestricted right to appoint the corpus either by will or during life.

The exceptions relating to gifts of terminable interest correspond generally to the similar provisions under the estate tax discussed above. In addition, the marital deduction is disallowed in the case of a gift of a terminable interest if the donor retains in himself an interest which may ripen into enjoyment after the termination of the interest transferred to the donor's spouse. The deduction is also disallowed if the donor retains the power of appointment over an interest remaining after the gift to his or her spouse. If a husband gives the entire interest in property to his wife and, by what is in effect a part of the transaction, she gives him a power to appoint any interest in such property, the marital deduction is not allowed with respect to the gift by the husband. An exception to the rule excluding terminable interest from qualifying for marital deduction is a gift by a donor to his spouse as a joint tenant with the donor or as tenants by the entirety. If the spouse is the sole joint tenant with the donor the marital deduction will be allowed.

As heretofore, $3,000. out of any gift to an individual is excluded in determining the amount of taxable gifts for the year. A husband may now donate $6,000. a year to his wife without incurring any gift tax: half of the property transferred to the wife is not a taxable gift, and as to the other half, a $3,000. exclusion is available. Similarly, if a husband and wife so elect, $6,000. may be transferred annually to each child without gift tax as each spouse can claim the $3,000. exclusion on his or her gift tax return.

Gifts by husband or wife to third party:

An amendment of widespread interest is the one by which gifts made by husband or wife to a third party may be considered as if made one-half by each, and therefore reportable to that extent by each on separate gift tax returns.

The right to do this is conditioned upon the consent of both spouses to treat the gifts made by them during the year as if made half by each. This is an annual option. This consent is to be signified in such manner as will be provided by regulation, and must relate to all gifts made by both spouses during the calendar year. The consent, once made, is irrevocable after the due date for the filing of the return for the taxable year.

The gift tax law does not contain any provision for this consent to be given by an executor of a deceased spouse. The death of a spouse should not prevent the splitting of gifts and it is to be hoped that the regulations will make suitable provision for this contingency.

Status as a spouse (for marital deduction):

The marital deduction is allowed only with respect to a donee, who at the time of the gift is the donor's spouse. Thus, no marital deduction is allowed with respect to a gift to an individual who was not the donor's spouse at the time of the gift, even though such individual was the donor's spouse some other time during the calendar year.

Status as a spouse for "splitting" gifts:

To be entitled to "split" gifts, the husband and wife must be married at the time the gift is made and both spouses must

be citizens or residents of the United States. If, for example, an unmarried individual makes a gift and later on during the calendar year marries, the gift cannot be considered as being made half by each spouse.

For the purpose of splitting gifts the law says that "an individual shall be considered as a spouse of another individual only if he is married to such individual at the time of the gift and does not remarry during the remainder of the calendar year."

Although this provision is not as definite as it could be when applied to various situations, it would seem reasonable to interpret it as providing that if the marriage is broken by divorce or death of one spouse, and there is a remarriage during the remainder of the calendar year, by either of the divorced spouses, or by the surviving spouse, then the splitting of gifts for that year is not permitted. Apparently the person who remarries may "split" subsequent gifts with his new spouse.

The gift tax, it must be remembered, is computed on a progressive scale of rates based upon the aggregate of gifts made by each donor since the enactment of the gift tax law in 1932. Husbands and wives may therefore be in different gift tax brackets. That accounts for the fact that the "splitting" device in income taxation is accomplished by requiring a joint return, whereas in gift taxation it is accomplished by permitting each spouse to report half of the gifts made by both spouses to third parties, and by allowing a marital deduction for gifts made by one to the other.

CIVIL ARREST AND EXECUTION AGAINST THE PERSON

By HOWARD C. BUSCHMAN, JR., AND ARNOLD L. MAYERSOHN

The Judicial Council of the State of New York, in its Twelfth Annual Report (1946), made sweeping recommendations for the abolition of imprisonment in civil actions at law. In its Fourteenth Annual Report (1948), the Judicial Council has completely reversed itself and tabled the matter. This action was admittedly induced by the opposition of a majority of Bar Association Committees which considered the recommendations. The Judicial Council now feels that "neither repeal nor modification of the provisions affecting these remedies is warranted at this time." This reversal of position prompts a study of the entire subject of civil arrest in legal actions.

(a) *The Law in New York*

For the purposes of this article, this article shall be concerned primarily with two sections of the Civil Practice Act: Section 764, which authorizes the issuance of an execution against the person, and Section 826, which sets forth those types of legal actions in which the provisional remedy of civil arrest may be available. But certain other provisions of our laws must also be examined in order to more fully appreciate the full significance of imprisonment for debt as it exists today.

The phrase, imprisonment for debt, is of course a misnomer, at least in the connotative sense. It must be recognized at the outset that the two so-called remedies no longer afford the creditor an effective means of collecting his due. There is no apparent method of determining how many times a resort to such means has had a remedial result. But later it will be shown that the ordinary motive for invoking these processes is a desire to punish, coerce, or exact vengence. Until a little more than a hundred years ago, a debtor, when incarcerated, was confined until the debt was satisfied. At present, such is not the function

of the imprisonment. A debtor may be confined for a limited period only, and may eventually be released with the creditor's sole satisfaction being the knowledge that the debtor suffered some discomfort and inconvenience. The turning point in New York began with the Stilwell Act of 1831. It was entitled an "Act to Abolish Imprisonment for Debt and to Punish Fraudulent Debtors." If these purposes had actually been attained then or now, there would be no real need to attack the law governing such imprisonment. However, investigation shows that legislative efforts have fallen short of these expressed objectives in a twofold manner: imprisonment for debt still exists, and debtors free of fraud may still be punished.

Section 764 of the Civil Practice Act provides for execution against the person, commonly referred to as body execution. It is here that the State of New York sanctions imprisonment for debt. While the whole section need not be here set forth, it will be advisable to note most of its provisions *in extenso.* It declares that:

> "Subject to the exception specified in the next section,[1] an execution against the person of a judgment debtor may be issued by the court or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act,[2] and where the plaintiff's right to arrest the defendant depends upon the nature of the action.[3] The issuance of the execution shall rest in the discretion of such court, judge, or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be

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[1] §765 states that "An execution cannot be issued against the person of a woman unless an order of arrest has been granted and executed in the action, and, if it was executed against the judgment debtor, has not been vacated."

§829 provides that a woman cannot be arrested on mesne process in a legal action unless "it appears that the action is to recover damages for a wilful injury to a person, character or property."

[2] §504 sets forth three types of cases where a final judgment may be enforced by execution:

a. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money.

b. Where it is in favor of the plaintiff in an action of ejectment or for dower.

c. In an action to recover chattel, where it awards a chattel to either party.

[3] Refers to those legal actions enumerated in §826 authorizing civil arrest on mesne process.

made by affidavit which shall set forth in detail the right of the party to the execution, . . ." [4]

The section was enacted in its present form in 1940 after former Section 764 was repealed. The significant feature of the present section is that it is now definitely settled that a court has discretion as to whether or not it will permit a body execution to issue.[5] The effect of the change has been to reduce greatly the use of this remedy. The reason for this result is made perfectly clear from the attitude of the courts as expressed in *Spence* v. *Aronson,*[6] decided in 1943. In this case the plaintiff had an unsatisfied judgment for personal injuries resulting from a fall in the defendant's grocery store. Plaintiff's affidavit set forth that defendant was placing obstacles in the way of collection of the judgment and plaintiff moved for a body execution. The court admitted that the cause of action involved was one in which an order of arrest under Section 826 could have been issued. Nevertheless the court denied plaintiff's motion:

"The papers before me do not warrant the exercise of discretion in favor of movant."

". . . it does not appear that he (defendant) intends to leave the jurisdiction and that he will no longer be amenable to process. It is not the purpose of a body execution to enforce the collection of a debt by imprisonment. The judgment was not obtained as a result of a malicious, wanton, or intentional injury. Apart from the difficulty of collecting her judgment, the plaintiff had not shown any other special circumstances to justify the granting of this drastic relief."

Yet in *Matter of Brown* v. *Father Divine,*[7] decided in 1941, the same court (Supreme Court, Special Term, N. Y. County) had

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[4] Remainder sets forth certain factual information which must be included in the affidavit.

[5] Previous to 1940 there were two definite lines of authority illustrated by the following negligence cases—in each Plaintiff had verdict for personal injuries sustained by being hit by defendant's vehicle.

Ossman v. *Crowley,* 101 AD 597, 92 NY Supp 29 (1905)—decided that since Plaintiff would have been entitled to have defendant arrested on mesne process, plaintiff was entitled to have an execution against the body issued as a matter of right. *Morgan* v. *Cohen,* 168 Misc. 251, 5 NYS2d 615 (1938)—in denying plaintiff's application for an execution against the person of defendant, the court said: "From all of the foregoing, it is impossible to perceive how any practical result can be achieved by judgment creditor by his incarceration of the judgment debtor . . ."

[6] 43 NYS2d 958.

[7] 176 Misc 10, 26 NYS2d 570.

reached a seemingly opposite conclusion. In that case the plaintiff had obtained an unsatisfied judgment in an action the facts of which properly brought it within Subdivision 7 of Section 826. The plaintiff had applied for issuance of a body execution. The sole question was one of discretion, and in granting the application the court had spoken as follows:

> "Were this a poor preacher, I might be disinclined, in the exercise of discretion, to authorize so drastic a remedy as civil arrest (referring to body execution). Being convinced, however, that he has access to money or property sufficient to satisfy his creditors, but has succeeded in evading collection of his debt, a quite different solution is presented. The ends of justice in this event require that every weapon of the law be employed to prevent continued flouting of the mandate of the court. Should the judgment debtor prefer to go to jail, rather than submit and pay, that will be his affair."

Apart from this problem of the uses of discretion in issuing a body execution, those types of actions in which the remedy may be available must be examined. In addition to those cases enumerated in C.P.A. Section 504 (see footnote 2) the case must fall within one of the nine subdivisions of Section 826. Before analyzing that section, it will be of benefit to discuss some of the related aspects of execution against the person which are not indicated in Section 764 as set forth above.

One important feature is that an unsuccessful plaintiff, in an action wherein he could have had an order of arrest, may be imprisoned on a body execution following an unsatisfied judgment for costs in the defendant's favor—this despite the fact that the plaintiff had never asked for an order of arrest and, in all probability, had never intended to have the defendant imprisoned.[8] And it appears that a successful defendant who could not have been arrested for some reason such as its corporate nature may nevertheless have a body execution issued against the unsuccessful plaintiff.[9]

Generally speaking an execution against the person cannot be issued until an execution against the property of the judgment debtor has been returned wholly or partly unsatisfied.[10]

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[8] Davids v. The Brooklyn Heights RR Co, 104 AD 23, 93 NY Supp 285 (1905).
[9] *Ibid.*
[10] C.P.A. §766.

The body execution is not a satisfaction of the judgment although the judgment creditor surrenders his lien upon the debtor's real property and during imprisonment may not pursue any other remedies against the debtor or the debtor's property. Only one body execution may be issued in the same action [11] unless the debtor escapes from prison [12] (or from the liberties of the jail).

The term of imprisonment of the debtor under a body execution depends upon the amount of the unsatisfied judgment being enforced. If the judgment is less than five hundred dollars, the term is three months; if five hundred dollars or more, the limit is six months.[13] The term of imprisonment may be shortened in various ways by assent of the judgment creditor or by appropriate action by the judgment debtor. The judgment debtor may of course secure his release from prison by agreeing to confine himself within the designated liberties of the jail upon delivering to the sheriff an approved undertaking.[14] The liberties of the jail may include a city or even a county where the judgment creditor is free to roam at will while the three or six month period runs out.

It has been pointed out that a body execution will issue only in an action wherein an order of arrest might have been had. Section 826 of the Civil Practice Act provides for the provisional remedy of civil arrest. It is here that the statutes permit a debtor free of fraud to be punished; it is here that a person may be deprived of liberty before it has been adjudged that he has committed a compensable wrong; it is here that the state's punitive machinery may be employed at the request of an individual who alleges he has suffered a personal injury under circumstances which may have been entirely free of criminal wrong.

In its Twelfth Annual Report, the Judicial Council has conveniently grouped the nine subdivisions of Section 826 into three general categories:

1. "Causes of action for the recovery of damages resulting from voluntary and involuntary torts." (This would include personal injuries ranging from willful assault to

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11 C.P.A. §768.
12 C.P.A. §769.
13 Civil Rights Law §72.
14 Correction Law §515.

mere negligence; injury to property; fraud or deceit; and the like).

2. "Causes of action in contract, express or implied, coupled with the tortious element of fraud (*i.e.* in contracting or incurring the liability) or fraudulent misapplication of money or property by a fiduciary."
3. "Causes of action in replevin, coupled with the tortious elements of concealment, removal or other wrongful disposition of the chattel."

It should be remembered that the right to the order of arrest depends primarily upon the nature of the action as set forth in the complaint. In other words, there can be no arrest in any legal action not enumerated in one of the subdivisions. However, the section uses the permissive words, "a defendant may be arrested . . .," and the courts have often refused to issue an order of arrest as a matter of discretion unless the applicant can show more than the mere existence of a specified cause of action. *Gelles* v. *Rosenbaum* [15] is a leading case illustrating the employment of judicial discretion and is a fine example of how the courts as a practical matter put restraints upon the use of civil arrest on mesne process. It seems to indicate that judicial opinion recognizes the failure of our statutes to provide for only those results deemed desirable. The action was for false imprisonment and plaintiff moved for an order of arrest before trial. Plaintiff had been selling steamship tickets for defendant and defendant claimed that plaintiff had misappropriated funds. Defendant then caused plaintiff's arrest upon a charge of felony without first having obtained a warrant. After the arrest, plaintiff had been discharged by the Magistrate. Realizing that defendant's act did not under the law amount to a crime and that his only recourse lay in civil action, plaintiff nevertheless clearly felt that a money judgment would be insufficient recompense. Hammurabian logic might prompt some to sympathize with the plaintiff. Fortunately, the court, in denying plaintiff's motion, was prompted by more legalistic considerations. As a matter of discretion, the court pointed out that it is proper in tort actions to grant such a motion only in cases of assault and battery, libel or slander, or outrageous or extreme torts, unless some other special ground is shown justifying an arrest. "The very purpose of arrest is to insure

[15] 141 Misc 588, 252 NY Supp 827 (1931).

defendant's presence in obedience to final process. . . . The only apparent reason for the arrest sought is that plaintiff desires that defendant be punished for causing the arrest of plaintiff on the criminal charge. . . . The facts and circumstances shown do not justify the granting of the order to gratify that desire." In a matter involving personal restraint, it is axiomatic that the sovereign power should give clear, concise, unvarying and unmistakable expression as to just what acts are sufficient to warrant an arrest. An arrest is too serious a punishment to permit an unsettled condition as to it to exist in the law. Discretion should never be abused, and no one would contend that an intentional abuse is likely. Nevertheless, judicial discretion is an uncertain safeguard, and there is an ever present possibility that the procedural machinery of civil arrest will permit some plaintiffs to inflict personal revenge, despite the ardent watchfulness of the courts.

The statement has been made that civil arrest under Section 826 permits a debtor free of fraud to be punished despite the avowed purpose of reform expressed in the Stilwell Act. For example, vicarious liability for some of the specified acts will bring defendant within the purview of the statute. On the other hand, the fraud connected with actions based on contract must be personal to warrant the order of arrest or body execution. *Hathaway* v. *Johnson*,[16] decided in 1873, gives expression to this principle. Plaintiff brought an action to recover the purchase price of goods sold and secured an order of arrest by alleging fraudulent representations by defendant. But here the defendant was guilty of imputed fraud only. In vacating the order, the court ruled that in such actions the defendant must be guilty of personal fraud to justify an arrest. The court indicated however, that defendant might have been arrested under the same facts if plaintiff were suing for damages for fraud or deceit within present Subdivision 5. But in *Ossman* v. *Crowley*,[17] plaintiff had been run over by a hanson cab operated by defendant's servant and had sued to recover damages for personal injuries within present Subdivision 2. The issue involved was whether or not plaintiff was entitled to a body execution, but the principle is the same in civil arrest. In denying defendant's motion to vacate the execution, the court said: "That cause of action is for a personal injury, whether the in-

[16] 55 NY 93, 14 Am. Rep. 186.
[17] 101 AD 597, 92 NY Supp 29 (1905).

jury to the person is caused by personal act of the defendant or by the act of his servant for which he is responsible." In a similar case,[18] the court said that the master might be imprisoned for a servant's assault committed while acting in the master's physical employment and within the scope of his authority, even though not in his presence or with his knowledge, sanction or ratification. The court felt constrained to follow this reasoning because the Common Law permitted arrest for imputed or constructive negligence or assault and the Legislature had not expressly changed it.

Before turning to more mechanical aspects of civil arrest on mesne process, a further safeguard employed by the courts should be noted. A plaintiff cannot avail himself of civil arrest merely by setting up a complaint alleging fraud and damages, at least when the defendant can successfully contend that damages have not been sufficiently shown. In *Peterson* v. *Kirby*,[19] plaintiff alleged fraud by misrepresentation of defendant and secured an order of arrest. Defendant conceded that plaintiff had shown a prima facie case of fraud, but moved to have the order vacated because plaintiff had not shown actual damage. In granting defendant's motion, the court said that "This provisional remedy is a stringent one which should be granted only upon clear proof that the plaintiff has suffered legal damage by reason of the defendant's false representation." Let it not be overlooked, however, that the defendant was put to the trouble of moving to vacate an order of arrest which should never have been granted. Furthermore, fraud is a flexible term which can initially appear descriptive of a great many transactions. And where fraud has been successfully alleged, damages seem to attach almost as a matter of course.

Plaintiff's procedure in obtaining the order of arrest once he has determined that he has a proper case is relatively simple. The application may generally be made either to the court in which the action is brought or to a judge thereof.[20] It may be made at any time before final judgment,[21] either before or after defendant's appearance, and may be made without notice.[22] The necessary papers in every case are an affidavit or equivalent, and an undertaking. In the three cases enumerated in sub-

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18 Davids v. The Brooklyn Heights RR Co, 104 AD 23, 93 NY Supp 285 (1905).
19 192 AD 707, 183 NY Supp 169 (1920).
20 C.P.A. §817.
21 C.P.A. §818.
22 C.P.A. §815

divisions 6, 7, and 9, the complaint is also required.[23] The affidavit (and complaint if required) must satisfy the court or judge that the plaintiff is entitled to an order of arrest. The undertaking is security given for the protection of the person against whom the order is to be directed.[24] By the undertaking, the plaintiff contracts that, in the event the defendant recovers judgment, or it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs awarded to the defendant and all damages which he may sustain by reason of the arrest, not exceeding the sum specified. The amount of the undertaking must equal at least ten percent of the amount of bail required by the order, and must not be less than two hundred and fifty dollars. The order of arrest must state the grounds upon which it is granted.[25]

There is no definite limit as to how long defendant may be imprisoned on mesne process. It is up to the defendant to take the steps necessary to secure his discharge or release.[26] Failure to do so will result in confinement until final judgment. This might well cover a long period as plaintiff would probably be content to let matters drag on and thus keep defendant confined. Apart from defendant's right to prevent issuance of the order, he may take other steps in his behalf. He can move to vacate the order of arrest, or move to reduce the bail or increase the security given by plaintiff.[27] The defendant can also procure his liberty by giving bail or deposit,[28] or procure his freedom within the liberties of the jail by giving an undertaking or a deposit.[29]

Considering the rights of plaintiff and defendant in an action where the provisional remedy of civil arrest is invoked, it becomes apparent that securing an order of arrest ordinarily gives plaintiff no assurance of satisfaction of his judgment. The bail undertaking, except in an action to recover a chattel, merely assures defendant's presence after judgment when plaintiff may seek to enforce his judgment by body execution.[30] If there is no escape, the undertaking is of no value to plaintiff.

The alternative undertaking for the jail liberties, which a

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23 C.P.A. §833.
24 See C.P.A. §835 for its terms.
25 C.P.A. §821.
26 Levy v. Solomon, 105 NY 529, 12NE53 (1887).
27 C.P.A. §842.
28 C.P.A. §847.
29 C.P.A. §848.
30 C.P.A. §849.

defendant may give to procure his freedom within the designated limits, is to a similar effect. Even if the defendant escapes, his subsequent return within the limits prior to the time for service of an answer in an action against the sheriff for the escape will be a complete defense. Similarly, the sureties may defend an action for the escape by showing the defendant's return to the limits prior to commencement of the action.[31]

Once an execution against the person has been issued, the defendant may still secure his freedom within the liberties of the jail, and at the end of the statutory period of three or six months must be released just as if he had been actually confined. Here again the undertaking is conditioned only to damages for escape.

(b) *Background*

The ameliorated aspects of present-day New York law on the subject, as surveyed above, may largely be traced to a wave of reform which swept the country in the early part of the nineteenth century. This was the era which marked the passage of New York's Stilwell Act, effective March 1, 1832. Although it was not the first American move of its type,[32] the Stilwell Act gave impetus and direction to the national trend toward limitation of imprisonment of debtors to instances founded in fraud.

Those were the days of the notorious evils of the debtors' prisons, both here and abroad. Not the least infamous was New York's Bridewell, which became a debtors' prison after it had outlived its usefulness as a state penitentiary. Much has been written of the abuses practiced there and elsewhere,[33] but nothing so revealing to the imagination as the oft-quoted pronouncement of Mr. Justice Hyde in *Manby v. Scott:* [34]

> "If a man be taken in execution and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the

[31] For defenses of the sheriff see Correction Law §528; for defenses of the sureties see Correction Law §550.

[32] For example, Kentucky in 1821 limited arrest in civil actions to cases of absconding debtors. New York had earlier established a complicated and difficult procedure for discharge of imprisoned debtors in 1789, later modified by the "Fourteen Days Act" of 1813, so named because of the period for notice to creditors.

[33] For a portrayal of the conditions at Bridewell, see David McAdam, *The Stilwell Act;* see also Charles Dickens, *Little Dorrit,* which gave wide publicity to conditions in England's Marshalsea Prison.

[34] 1 Mod. 124, 132; 86 Eng. Reprints 781, 786 (1659).

sheriff who took him, is bound to find him meat, drink, and clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law; and so say I." [35]

Although the history of the last century has been one of progression away from the practice of imprisonment on civil process, such has not always been the trend. Imprisonment for debt seems to have been a recurrent legal disease.

The early common law of England afforded no similar remedy against debtors, on either mesne or final process. And in continental Europe the later Middle Ages scarcely knew the practice. In contrast, the most stringent measures had previously been taken against insolvent debtors. Ancient laws on the subject were extraordinarily and uniformly severe, probably, it has been suggested, as a result of the parallel development of contract law which originally abhorred suspense of payment in general, and in particular favored the person who had completed his part of the bargain.[36] So severe was the Roman law of debt, for instance, that few other actions afforded such harsh remedies. Judgment debtors, held by their creditors in chains, were given sixty days in which to compromise the debt—after that, death or sale into foreign slavery. When there were several creditors, moreover, the law offered very simple and direct distribution proceedings; "Let them . . . divide their shares [of the debtor's body]; if they have cut too much or too little, it shall not prejudice them." [37]

We have noted that in its early stages our modern law gave the creditor no right to imprison his debtor. Both England and the continent had turned sharply away from the Roman and medieval custom of death, exile, or imprisonment for insolvency. This reversal of policy was due, however, less to an awakening of the moral consciousness than to the law's recognition of the feudal lords' exclusive rights to the services of their vassals.

But the influence of the Ecclesiastical Courts, which treated broken obligations as matters of spiritual censure,[38] coupled

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[35] And so said the law of New York until 1875 (Laws of 1875, Ch. 251).

[36] H. S. Maine, *Ancient Law* (10th ed.), 346.

[37] C. Salkowski, *Roman Private Law* (E. E. Whitfield, tr.) 953. But W. W. Buckland notes that cutting the debtor into pieces was not practiced, and that there is no record of its ever having been done: *Textbook of Roman Law,* 615.

[38] 5 Journal of Jurisprudence 242 and 303.

with the rising power of the merchant class during the Renaissance, served to revive the process. Originally conceived as a means of enforcing a defendant's appearance before the courts in the quasi-criminal action of trespass [39] (for the law gave no judgment in default of appearance), writs of *capias ad respondendum,* authorizing the sheriff to seize and hold the defendant, were extended by Parliament in the 13th and 14th centuries to actions first of account, then of debt, trover, and other legal actions. The courts then found it easy to extend the remedy to imprisonment after judgment *(capias ad satisfaciendum)* on the theory that, with debt, as with trespass, power to arrest on final process was an automatic concomitant of power to arrest on mesne process. Subsequent competition for creditors' suits between the Courts of Common Pleas and King's Bench [40] resulted in making the remedies available almost at will at any stage of an action.[41]

Such was the background from which American Colonial law in this field was developed. The Renaissance had cultivated the seed sown by both church and merchant; and the courts had hastened to reap the harvest. The protests of thoughtful citizens had not yet become sufficiently articulate to be effective. Thus the American colonists brought *capias* with them into the new world. Not even Georgia, colonized largely by fugitive debtors, escaped the tradition.

The greatest abuses obtained in imprisonment to enforce collection of judgments. Although a defendant could in many actions be arrested on mesne process, without any special order (the New York rule), the confinement was necessarily of a temporary nature, to insure his presence for final process.[42] In execution against the person following judgment, however, "for any debt, damages, sum of money, or costs," a defendant was to be "safely kept in secure custody in the manner prescribed by law, at his own expense, until he should satisfy the

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[39] Trespass was considered a breach of the king's peace.

[40] This court of criminal jurisdiction for a time captured nearly all creditors' suits by the simple device of *assuming* a trespass had been committed, on the basis of which fiction the court could then have the defendant arrested. Once in the custody of the court, the defendant could be reached in any personal action which otherwise would properly be brought in Common Pleas.

[41] For a discussion of the origin and development of *capias,* see Pollock and Maitland, *History of English Law* (2d ed.), 594 ff.; also 3 Holdsworth, *History of English Law,* 131, 132; also 2 Temple L.Q. 4, 330.

[42] Including debt, contract (where damages were liquidated), trover, trespass, and replevin; and on order in any other action for damages—2 R.S. 348.

execution or be discharged according to law." [43] It is hardly necessary to mention that, being in prison, he had no means of earning the necessary money. In this connection the amusing story was circulated of an Indian imprisoned about 1830 in the Albany jail for breach of a contract to supply beaver skins. Asked why he was imprisoned, the Indian replied that he certainly did not know: that it seemed to him to be a very poor place to trap beavers.[44]

The practice continued more or less unabated in the New World until the growing resentment of the people led to passage of many restrictions on imprisonment for debt. The result in New York, as we have noted, was the Stilwell Act, whereas in many other jurisdictions the limitations took the form of constitutional provisions. The publicity given to the abuses of the process had been widespread. Many articles and pamphlets had been published, some almost amusing in their zealous demands.[45] In addition, public attention was drawn to the debtors' plight by the use of advertisements in the press soliciting gifts of food, clothing, and firewood, made necessary by the rules which required the prisoners to sustain themselves.

Meanwhile, perpetual imprisonment had been alleviated by passage of various provisions for the discharge of insolvent debtors, culminating in the Fourteen Days Act of 1813,[46] which authorized discharge of the imprisoned debtor after specified terms of imprisonment on compliance with various conditions, including full assignment for benefit of creditors. From this act our modern Articles IV and V of the Debtor and Creditor Law evolved.

Passage of the Stilwell Act was widely heralded among the poorer classes, and the legislature even delayed its adjournment until the bill was brought in with the governor's signature. The act for the most part abolished imprisonment in actions based on contract, express or implied, except in cases of fraud, and in this sense the law for the first time distinguished between honest and dishonest debtors.

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[43] 2 R.S. 376, §76.

[44] David McAdam, *The Stilwell Act,* 10.

[45] "For if by *fire, storm, cheats,* or the *tongue sat on fire of hell,* a man in trade and business . . . suffers, the moment any remarkable unfortunate stroke befals, away come his greedy voracious creditors, who, like men of *prey,* glut themselves immediately, not in the least caring who sinks or swims, starves or perishes."—*Address to the People of Massachusetts on . . . a Law for the Relief of Insolvent Debtors,* by "a young man of Boston," (1813).

[46] See footnote 32, *supra.*

The Stilwell Act, which laid the foundation for our modern statutes governing civil arrest and execution against the person, had no application to tort actions. However, subsequent modifications incorporated into Section 179 of the Code of Procedure (adopted in 1848 and several times amended) and into the revisions constituting the Code of Civil Procedure (1876–77), together with later minor changes, resulted, by 1879, in substantially the law as carried over into our present Civil Practice Act. The only subsequent changes involved deletion of a provision affecting availability of the remedies in an action for breach of promise to marry (1939), and provision for the exercise of the discretion of the court in granting an order for body execution (1940).

Meanwhile, in other jurisdictions, the trend, like that in New York, has been strongly away from the former harsh laws against insolvent debtors. England in 1838 greatly restricted arrest prior to judgment,[47] and in 1869 imprisonment on mesne or final process was abolished except in cases of fraud or willful disobedience of a court order to pay a judgment in installments.[48]

Throughout the United States, imprisonment on civil process has been abolished or greatly limited, by either constitutional or statutory provisions. Frequent exception is made in cases of fraud or imminent departure, particularly in respect of execution after judgment. In some states arrest has been abolished on mesne, but retained on final, process.[49]

Procedure in the federal courts has, since 1839, been required to be in conformity with the arrest laws of the state in which the court is sitting.[50]

(c) *Is Revision Desirable?*

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Within the field of law, the retention of these remedies in New York State has been repeatedly attacked from many sides. Nor are the attacks of only recent origin. Speaking in 1905

[47] Judgments Act, 1 and 2 Victoria, ch. 110.

[48] Debtors Act, 32 and 33 Victoria, ch. 62.

[49] 6 C.J.S. 628, *et. seq.*, and cases cited therein; see also 25 Mich. L.R. 24, 33 (1926). For applicable statutes and constitutional provisions in U.S. jurisdictions, see 12 Jud. Council Rep. 362 (1946).

[50] *Cooper* v. *Dungler,* 6 Fed. Cas. No. 3, 192, 4 McLean 257 (1847).

before the 28th annual meeting of the New York Bar Association, Charles E. Hughes called for the abolishment of these last traces of imprisonment for debt. His report has been liberally drawn upon in the Twelfth Annual Report of the Judicial Council (1946), to which reference was made in the opening sentences of this article.

It must be observed, however, that the retention of these remedies here and in many other jurisdictions is hardly accidental. The Legislature has deemed it wise to make them available to suitors, and it is our present purpose to consider the ends sought to be achieved.

We pass over the right of arrest available before or after final judgment in equitable actions under CPA Section 827. This statute is not concerned in any degree with imprisonment for debt adjudicated or claimed. Indeed it is fundamentally different in that its purpose is to help the court render an enforceable decree rather than to enable the individual creditor to collect a money judgment. As a substitute for the former writ of *ne exeat,* abolished by the Legislature in 1877, it authorizes the court in its discretion to grant an order of arrest where there is danger that a judgment or an order requiring the performance of an act will be rendered ineffectual by reason of nonresidence or imminent departure of the defendant.

As earlier demonstrated, the right of body execution serves the general purposes of preventing certain judgment debtors from circumventing the processes of law, and of providing a special means of coercing satisfaction of judgments originating in certain tortious or fraudulent acts. Civil arrest as a provisional remedy before judgment, under CPA Section 826, serves the immediate purpose of insuring that defendants in these special cases are available for final process, viz., body execution.

On first analysis, the reasons for the existence of these remedies seem entirely logical and acceptable. No one questions the belief that judgment debtors should be restrained from flouting the judgments of the courts by fraudulent or evasive devices. To have meaning the law must be effective. It seems reasonable that a judgment debtor be prevented from carrying into execution a plan to secrete his property, or remove it from the state, or do one of a dozen things to place it beyond the reach of his creditor—in short, where he is solvent but nevertheless resolved to prevent collection of the judgment by fraudulent devices, the law ought not be powerless to prevent

his so doing. Under such circumstances it would seem that the courts, in a proper exercise of their discretion, should grant the order.

Viewed in this light, imprisonment to prevent such an act seems far removed from the historical concept of imprisonment for debt. The sanction seems rather to become one not of imprisonment for debt, but of imprisonment to prevent fraud. Such has been the approach of courts of several states validating incarceration under such circumstances in the face of even a constitutional provision against imprisonment for debt.[51]

The reasons behind the second general purpose of the statutes seem equally appealing. The general tenor of the types of actions involved implies at least a moral wrong in the defendant,[52] and accordingly it seems appropriate to hold that in such cases special coercive remedies should be accorded the successful party. It is not hard to conclude that where a person has, for instance, wrongfully withheld another's property, or has fraudulently tricked him into a bargain, special measures should be made available to keep him on hand for final judgment and to coerce payment for his unrecompensed fraud. Or, again, it may be observed that such special measures may well be necessary where the defendant is a thorough-going scoundrel to whom the ordinary sanctions of the civil process mean little or nothing.

It might also be argued that the punitive nature of the remedies may be a deterrent to the commission of certain fraudulent acts. In this connection Chancellor Kent suggested that one of the objects of imprisonment for debt was to check the disposition to run into debt heedlessly and fraudulently.[53] Our present statute similarly may be regarded as one additional factor conducive to the prevention of wrong-doing.

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So run the arguments in support of civil arrest and body execution. The efficacy of the law is not to be circumvented; certain creditors are to be assisted in the enforcement of judgments; fraudulent practices are to be discouraged.

It must be remembered, however, that in each instance the

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[51] E. R. Parnass, *Imprisonment for Civil Obligations in Illinois,* 15 Ill. L.R. 559 (1921).

[52] Only subsections 2 and 3 (in part) of CPA §826 are exceptions.

[53] 2 Kent's Commentaries (3rd ed.) 398.

sanction employed is physical restraint, which is to say, punishment, and that the major premise underlying every argument in favor of these special remedies is that the individual has the right to invoke such sanction of the state in behalf not of the people, but of himself. But it is precisely this premise which is rejected in every modern approach to the question of sanction. Indeed, we no longer give a second thought to the right of punishment by an individual; the theorists concern themselves with the problem of justification of punishment by the state. Whatever approach is made to the question, whether that of considering punishment in the aspect of prevention of wrong-doing, or as retribution in the Hegelian sense, there is no modern acceptance of any right in one individual to punish another. Every approved theory of punishment is predicated upon the hypothesis that the wrong committed against society and the punishment exacted is exacted by society. To place the power to exact punishment in the hands of the individual (through the instrumentality of the state) is to negate the entire concept of punishment as an element of the relationship between the individual and the state.

That execution against the person is punitive in nature can hardly be denied. Although it is of course conditional in the sense that release may be effected by satisfaction of the judgment on which it is based, or assignment for benefit of creditors, it is patently a coercive remedy involving incarceration by the state. It was this fact which led Charles E. Hughes to characterize it as a punitive measure unsound in principle.[54] Even the original Stilwell Act was in its title described as "An Act . . . to Punish Fraudulent Debtors." To observe that only certain specified groups of debtors are singled out and subjected to the process serves but to emphasize the point.

In dealing with the subject the courts early recognized the anomaly of enforcing the criminal process in civil suits. In *Lynde v. Montgomery*,[55] the court felt constrained to say of the Stilwell Act: "It assumes that *the people* have a cause of complaint, and proceeds upon the ground of a fraud either intended or committed." It is submitted, however, that this assumption that the complaint belongs to the people is the very one that is logically inconsistent with placing in the hands

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[54] Charles E. Hughes, *Arrest and Imprisonment on Civil Process*, Rep. N.Y.S. Bar Ass'n (1905), 151, 170. This work will hereinafter be cited as Hughes.

[55] 15 Wend. 463 (1836).

of the individual the right to invoke the remedy in his own behalf.

Thus we have come to the core of the matter. The basic objection is not a moral one founded on a brief for preservation of individual liberty. There is no present concern over a wholesale revival of imprisonment for debt as such. For as formerly known and violently resented, that type of imprisonment simply does not exist in New York State. The court in the exercise of its discretion will not grant the remedy, in the absence of necessary extrinsic facts. But, regardless of how prudently the courts act, or of how discerningly they separate the honest from the merely vindictive creditors, the law must be recognized as an anachronism no longer consistent with our modern jurisprudence.

Aside from the matter of being unsound *in principle,* civil arrest and body execution invite criticism on several more immediately practical grounds.

In the first place, the fact that civil arrest as a provisional remedy is available on *ex parte* application affords opportunity for abuse in a field where the strongest safeguards should be present. Being so available, it can easily be made the means of extortion and oppression. Of this we shall say more later. For the present it is sufficient to note Mr. Hughes' observation that in his experience in New York the remedy was even then little used by lawyers of good standing.[56]

Secondly, it may be observed that the security undertaking required of the applicant is totally inadequate to compensate for the potential damages which may be suffered by the defendant, affording no opportunity for recovery of damages to the defendant's reputation. As pointed out in the 1946 Judicial Council Report, the public mind knows no distinction between civil and criminal arrest, and the same stigma attaches to the one as to the other. Moreover, whether the defendant be held in jail an hour or a year on an unwarranted arrest order, his recovery is limited to the amount of plaintiff's undertaking.

Thirdly, in practice the several opportunities for relief from such imprisonment are proportionately more difficult for the poorer class of defendants. Supplying bail, a bond for jail liberties, or deposit in lieu thereof may be impossible for such a defendant, who, even as an insolvent willing to assign for

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[56] Hughes, 173.

benefit for creditors, can apply for exemption only in contract actions.[57] This correspondingly greater hardship on the poor, although present of course in criminal arrest, seems especially inappropriate in civil actions.

Fourthly, in practice the statutes are completely ineffective as a deterrent to active wrongdoing. The active wrongdoer who knows that he might be arrested under these statutes is also aware of the easy availability of release on bail or liberties of the jail, and will be concerned in advance only with the danger of criminal prosecution. For, as previously noted, save in a replevin-type action, the undertaking for bail or liberties of the jail is conditioned only against escape. The only fear generated by the statutes is in the mind of the poor and friendless, after confinement.

Fifthly, other remedies are available, less harsh in their operation, but equally effective in almost every instance as means of achieving the purposes of the arrest and execution statutes. Writs of attachment and replevin may be had during the pendency of an action to prevent removal of fraudulent disposition of property; supplementary proceedings, to aid in its discovery thereafter.

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Many of the criticisms above were voiced in the Twelfth Annual Report of the Judicial Council recommending repeal of the statutes governing execution against the person and civil arrest as a provisional remedy in law actions. The revisions were strongly urged by the Council during 1946 and 1947.

Why, then, has the Council reversed its position? In introducing the question, the Fourteenth Annual Report notes that of three Bar Association Committees asked for recommendations, two opposed modification of the statutes.[58]

Opposition by members of the Bar to revision of such laws is not new. In reviewing this point over forty years ago, Mr. Hughes noted that when the English Parliament was considering revision of the cruel provisions governing imprisonment for debt in 1832, the most articulate lawyers of the day were prom-

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[57] Mat. Weiss, 291 N.Y. 451, 52 N.E. 2d 945 (1943).

[58] The N.Y.S. Bar Ass'n and the Ass'n of the Bar of N.Y.C. The N.Y. Co. Lawyers Ass'n favored revising the law—N.Y. Law Jour., Feb. 27, 1948, p. 734 (the report is not yet in book form).

inently arrayed against the change.[59] Then, as now, the demand was for retention of an effective means of dealing with fraudulent debtors.

The reasons for the change of position are set forth concisely in the Council Report:

> "Two basic considerations influenced the Council's decision to table the proposal. First, although the application of these devices is rarely necessary, in certain situations it appears to be the only remedy available to a plaintiff. Second, while the remedies of arrest and body execution are severe and theoretically subject to abuse, the discretion in the court or judge, in which the granting of an order of arrest since the Stilwell Act of 1831, and in the case of issuance of body execution since 1940 rests, has proven an adequate barrier against abuse." [60]

Speaking of the first consideration, the report went on to say that if the remedies are useful as the only means of securing a defendant's presence to answer to final process, "the abolishment of such remedies cannot in good conscience be recommended." [61] The report offered as examples the situations in *Condon v. Derringer* [62] and *National Surety Corporation v. Gutierrez.*[63] In each case the defendant was about to leave the state, Derringer, a major league baseball player and Ohio resident, to continue his swing around the league circuit, and Gutierrez to return to his Cuban domicile. In the Derringer case, execution against the person was granted, and in the Gutierrez case, motion to vacate an order of arrest served with the summons and complaint was denied.

In addition to the observation that it takes a stern conscience to condone arrest on civil process without a hearing, one might point out that in any action the plaintiff may of course sue on his judgment in the foreign jurisdiction, and that only the plaintiff whose action falls within the required categories of the arrest statutes has the additional advantage of physical restraint as a coercive measure.

With respect to the second basic consideration motivating

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[59] Hughes, 158.
[60] N.Y. L.J. (2/27/48) 734.
[61] *Ibid.*
[62] 171 Misc 381; 12 NYS2d 647 (1939).
[63] 51 NYS2d 349 (1944), aff'd 269 A.D. 664.

the Council, *viz.*, that discretion in the court or judge has proven an adequate barrier against abuse, it is interesting to note that in its 1946 report the Council said of civil arrest, "The judge who grants the order makes no inquiry into the veracity of the assertions and, before granting the order, offers the defendant no opportunity to disprove the assertions." [64]

In any event, since the court does not look behind the moving affidavits, faith in the discretion of the court involves an assumption of universally honest motives on the part of plaintiffs who invoke the remedies. A few illustrations may help shed light on the validity of this assumption.

Investigation has disclosed no recent inquiry into the details surrounding any large number of arrest cases. But in 1904, when our arrest statutes were almost identical with those of today, Sheriff Michael Erlanger of New York County on his own initiative personally investigated every case of arrest or body execution resulting in actual imprisonment within his jurisdiction. The results were revealing: "In not one of them" had he found "any justification for the confinement of the citizen." Moreover, the only cases tried during the year were those the Sheriff had forced to trial. "As a rule," the Sheriff concluded, "the motive in procuring the imprisonment of our poor citizens has either been to obtain revenge or to extort money from them." [65]

The Sheriff cited many cases illustrating his point. The customary procedure was to make out, in affidavits, an aggravated case of assault, slander, or other injury, on the basis of which the order of arrest would be granted. On such affidavits, for instance, a truckman, whose release the Sheriff procured, was held three weeks under one thousand dollars bail for an "assault" based on a shove or push he had given the plaintiff. In a conversion action where the defendant had been confined six months, the Sheriff forced the case to trial—at which time the action was dismissed! Nor was it unusual to find that persons who had causes of action for false arrest following a magistrate's dismissal of criminal assault charges were re-arrested on civil process and held until they gave releases of all claims for damages. In other instances the price the ignorant paid for release was a small and convenient sum in settlement of a groundless suit.

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[64] Twelfth Annual Report, p.342.
[65] An account of the Sheriff's report is contained in Hughes, 174–178.

In many instances the Sheriff's disclosure of the facts to the court resulted in discharge of the prisoner, or at least a great reduction in bail. In one case attorneys, who had on previous occasions been frustrated by the Sheriff's work, went into another county to obtain an arrest order in a slander action which the Sheriff reports was entirely spite work. Erlanger was a sufficiently practical man, however, to persuade the attorneys, under a "little pressure," to agree to bail reduction.

It would seem from the foregoing that those favoring retention of the current provisions must recognize the dangers of these types of frauds where arrest orders are obtainable on *ex parte* application. As observed by the Council in commenting on Mr. Hughes' assertion that the law governing civil arrest is easily made a means of extortion and oppression, "Nothing that has occurred in the intervening forty years tends to negative the correctness of the observations of Chief Justice Hughes." [66]

Nor does it meet the problem to say that the defendant may move to vacate the order. "It is submitted that justice can never be done by placing a man where he is forced to take the initiative in a fight for justice, with the burden upon himself to allege and prove his grounds for asking his freedom—a limit to which the state has not dared to go in the punishment of offenders against the public law." [67]

In conclusion is appears reasonable to us that, despite the several safeguards with which the laws are surrounded, Sections 764 and 826, together with related sections, of the Civil Practice Act should be reexamined with a view toward repealing them. At the very least, the measures are unsound in principle, representing application of the criminal process to private litigation. As preventative measures they are ineffective against the dishonest debtors at whom they are aimed. In practice they are unequally severe on the poor and the rich, and afford opportunity for extortion and vengeance. And finally, they require a defendant imprisoned without a hearing to take the initiative to regain his freedom.

In any event, if the measures are to be retained, thought should be given to their revision. The strongest champions of the remedies defend them only as they are administered in the best discretion of the court. We find no one today who maintains that a man should be arrested in mesne process simply

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[66] Twelfth Annual Report, p.345.

[67] James C. Finley, *Arrest of Defendant in Civil Cases*, 20 Ky. L.J. 478 (1932).

as a result of his having lent an automobile to a friend who operated it negligently. And yet, theoretically, such could be the case under Section 826 (3). It is but half an answer to say that on such facts alone the courts will not grant the remedy.

We can but conclude that insofar as the statutes are defended as practiced rather than as written it behooves the Legislature to recast them in language more nearly designed to insure the desired application on a uniform basis. Limitation of the availability to cases where the defendant is about to leave the jurisdiction, plus provision for such departure on sufficient security, along with stronger guarantees against extortion or spite on the plaintiff's part in the form of revised undertaking requirements to insure collection of full damages for the arrest and confinement, would, it seems, constitute a minimum step forward in the process of eliminating a harsh anachronistic practice.

THE SCHOOLHOUSE; AN ENIGMA

By JOHN D. HAYES

The advent of consolidated and centralized schools throughout the United States has occasioned the abandonment of numerous small school district properties. As a result, the courts of several states have been furnished with considerable litigation concerning the title to school buildings erected upon lands which were conveyed subject to reversion in case of abandonment of use for school purposes. Since the results reached in some jurisdictions are not in accord with the view generally adopted, a discussion of the problems raised seems pertinent at this time. One of the most recent cases is *Dickenson* v. *The Board of Trustees,* decided in October 1947 by the Texas Court of Civil Appeals.[1]

T. A. Dickenson and wife conveyed four acres of land to the Red Willow School District of Wise County, Texas, by deed containing the following recital: "The further consideration and condition is that should the property hereinafter described cease to be used for school purposes upon the premises herein conveyed, such conditions to be binding upon and to be observed by the grantees herein as well as their successors in office, and in case of non observance of the above conditions, then this deed shall be null and void, and the said premises shall then and there and wholly revert to the grantor herein, his heirs, executors, administrators, privies or assigns."

Subsequent to the conveyance, the trustees, with funds raised from taxes levied upon the property owners of the district, caused a school building, a five room teacherage, and some outbuildings to be erected upon the land so conveyed.

School was regularly conducted in the schoolhouse and the teacherage was occupied by the teacher of the school at all times up to about three or four years prior to November of 1946.

In the summer of 1946 the trustees decided that because of

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1 204 S.W.2d 418 (Texas 1947).

conditions attributable to the war, it was advisable to consolidate the district with the Chico Independent School District. Thereupon followed the complete abandonment of the use of the land for school purposes. The trustees notified the grantor of the intention to abandon and also of the intention either to sell the buildings or to tear them down and salvage the materials. This right was denied to the district by the grantor who commenced a statutory action for trespass to try title to the land and buildings. The final judgment awarded the land to the grantor but held that the buildings never became a part of the realty and therefore did not revert with the land, but remained the property of the district.

The decision reached by the Texas court excepts school buildings placed upon land subject to a reversionary clause from the operation of the universally recognized principle of law that permanent improvements placed on land become a part of the realty. The decision finds support in Ohio and Kansas,[2] but the weight of authority is contrary.[3] In New York, where almost complete centralization of schools has resulted in the abandonment of numerous small district schoolhouses, there is no reported case which directly involves the disposition of improvements. It is the purpose of this article to attempt to forecast the position which the courts of New York would take if called upon to decide a similar question.

Since there is such an abundance of authority opposed to the Texas, Kansas and Ohio view, it is deemed appropriate to examine the opinions of their courts to determine the validity of the arguments advanced to sustain their decisions.

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[2] Burdette v. Jones, 72 N.E.2d 152 (Ohio 1947), discussed p. 49, *infra;* Rose v. Board of Directors, 162 Kan. 720, 179 P.2d 181 (1947), q.v. note 24, *infra.*

[3] Williams v. Kirby School District, 207 Ark. 458, 181 S.W.2d 488 (1944); Richey v. Corralitos School, 67 Cal. A. 708, 228 Pac. 348 (1924); Rustin v. Butler, 195 Ga. 389, 24 S.E.2d 318 (1943); Malone v. Kitchen, 57 Ind. A. 119, 137 N.E. 562 (1922); Webster Co. Board of Education v. Wynn, 303 Ky. 116, 196 S.W.2d 983 (1946); New Hebron School v. Sutton, 151 Miss. 447, 118 So. 303 (1928); School District #42 v. Pribyl, 82 Mont. 295, 267 Pac. 289 (1928); Clark v. Jones, 173 Ore. 106, 144 P.2d 498 (1943); Collette v. Town of Charlotte, 114 Vt. 357, 45 A.2d 203 (1946); Allemania Fire Insurance Co. v. Winding Gulf Collieries, 60 F. Supp. 65 (S.D. W.Va., 1945); Putney v. School District #4, 215 Wis. 539, 255 N.W. 76 (1934).

The majority decisions are based on the concept of the law of Real Property that, as between a grantor and grantee, things permanently annexed to realty, the removal of which would materially injure the freehold, will be treated as a part thereof in the absence of agreement or a demonstration of intent that as between such parties they are to be treated as personalty; further, that no concept of public policy would require the courts to apply a different rule where the litigation involved public interest from that applied to private individuals.

The decision in the *Dickenson* case was not without precedent, for in 1914 the same court had arrived at a similiar conclusion in *Allen* v. *Franks* [4] under facts which differed in no material respect from those already reviewed. The major factual difference was that in the *Allen* case the building was erected with funds raised by donation rather than by taxation as in the principal case. Since the court in the *Dickenson* case placed great reliance upon the decision in the *Allen* case and adopted much of the reasoning used there, a discussion of the *Allen* case will dispose of many of the issues involved in the principal case.

The revised statutes of Texas in 1914, provided that the trustees of a school district were a body politic, corporate in law, with the power to contract, to sue and be sued, and to receive any gift, grant, donation or devise made for the use of the public schools of the district. Article 2845 [5] provided that "no mechanic, contractor, materialman or other person can contract for, or in any manner have or acquire any lien upon the house so erected or the land upon which the same is situated, and all contracts with such parties shall expressly stipulate for a waiver of such lien." Under the provisions of Article 2847 [6] "all schoolhouses erected, grounds purchased or leased for a school district . . . shall be under the control of the district trustees of such district or their successors in office, as the trustees for those to be benefited thereby . . ."

In applying the above statutes it was held that (1) upon donation of the funds to the district, title thereto vested in the trustees and the buildings erected with such funds became subject to existing statutes; (2) that interested parties must be held to a knowledge of the statutory provisions giving absolute control of the building to the trustees and prohibiting the fixing of a lien of any character upon the building, and, that since no lien of any character could be put upon the house, then for a more cogent reason, parties donating contributions to be used in constructing the building would have no right to claim a forfeiture of title to the building upon abandonment of the ground upon which the house was located; and lastly, that if the buildings were to revert, the grantor and not the trustees could forever control the location of the school building.

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[4] 166 S.W. 384 (Texas 1914).
[5] Revised Statutes.
[6] *Ibid.*

To meet the plaintiffs argument that according to the laws of Texas "a house erected upon land becomes a part of the freehold, in the absence of any intention by the parties erecting it that the same shall not become permanently annexed to the land," it was held that there was no consideration for the right to have the building revert; that if the trustees by intention to make the building a permanent improvement, or in absence of any intention that they might subsequently remove it, could make it part of the realty, then the grantor could control title to the school house indefinitely. Further it was held that the trustees who received the deed could vest in themselves authority to pass title to the building to the grantor, without consideration, and bind their successors to do the same, and that this would not be in the interest of the patrons of the school and to thus deprive them of title to the building would be a breach of trust and contrary to public policy. Regarding the question of public policy, the New York decision of *Chappell* v. *Brockway*[7] was cited for the proposition that "the common law will not permit individuals to oblige themselves by contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurous to the public . . ."

It is important to note at this point, the nature of the estate created by deeds of conveyance containing reverter clauses similiar to those under discussion here. The majority rule is that it is a fee on special limitation,[8] a base or determinable fee. It is a fee because it may endure forever and determinable because it is subject to being defeated by the happening of a contingency. Texas subscribes to this rule.[9] Other jurisdictions hold that it is an estate on condition subsequent.[10] However, the distinction between the two estates is not material here except as to the time at which grantee's estate terminates and

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[7] 21 Wend. 159 (N.Y. 1839), discussed at p. 47, *infra.*

[8] Williams v. Kirby School District, *supra;* Battistone v. Banulski, 110 Conn. 267, 147 A. 820 (1929); Lynch v. Bunting, 3 Ter. 171, 29 A.2d 155 (Del. 1942); U.S. v. 1119 Acres of Land, 44 F. Supp. 449 (E.D. Ill., 1942); Malone v. Kitchen, *supra;* Fayette Co. Board v. Bryan, 263 Ky. 61, 91 S.W.2d 990 (1936); First Church v. Croswell, 210 A.D. 294, 206 N.Y.Supp. 132 (N.Y. 1924); Burdette v. Board of Directors, *supra;* Collette v. Town of Charlotte, *supra;* Allemania Fire Insurance Co. v. Winding Gulf Collieries, *supra.*

[9] Eyssen v. Zeppa, 100 S.W.2d 417 (Texas 1937).

[10] Rustin v. Butler, *supra;* New Hebron School v. Sutton, *supra;* Moss v. Crabtree, 245 Ala. 610, 18 So.2d 467 (1944); Waddell v. School District #3, 79 Mont. 432, 257 Pac. 278 (1927); Halpin v. Rural Agriculture School District, 224 Mich. 308, 194 N.W. 1005 (1923).

the acts which are required of the grantor in order to effect a forfeiture.[11]

Keeping in mind the nature of the buildings, the general rules regarding things annexed to realty and the nature of the estate created, it is pertinent to examine the arguments used by the court to sustain its conclusion.

There is little doubt as to the validity of the argument that upon donation of the funds to the district, title thereto vested in the trustees and the buildings erected with such funds became subject to existing statutes. However, it is difficult to see the relevancy of the argument that because knowledge of the statutory provisions giving absolute control of the building to the trustees and prohibiting the fixing of any liens upon the buildings was imputed to interested parties, no lien of any character could be put upon the house, and that for a more cogent reason, parties donating contributions would have no right to claim a forfeiture of title to the building. The grantor had conveyed all the interest that he had in the property except the naked possibility of a reverter, non-alienable,[12] non-assign-

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[11] The following distinction has been made between the two estates:
"When an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fall, this is denominated a limitation . . . In such case the estate determines as soon as the contingency happens and the next estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon condition in deed . . ., the law permits it to endure beyond the time when such condition happens unless the grantor or his heirs or assigns take advantage of the breach of condition, and make either an entry or a claim in order to avoid the estate." 2 Blackstone's Comm., (Page *155).

It is evident from the above that in the last analysis the words used by the grantor control the nature of the estate created. For a discussion of the effect of various words *see Board of Chosen Freeholders* v. *Buck,* 79 N.J. Eq. 472, 82 A. 418 (1912).

See note 30, *infra.*

[12] The effect of an attempted alienation, according to the general view, is to remove the limitation upon the fee if it is a base or determinable fee. Similarly, if it is a fee on condition subsequent, attempted alienation defeats the grantor's right to declare a forfeiture.

Halpin v. Rural Agriculture School District, *supra;* Rice v. Boston & Worcester R.R. Corp., 12 Allen 141 (Mass. 1866); Restatement, Property Sec. 166 (1936).

[13] In the absence of a statute permitting assignment, an attempted assignment has the same effect as an attempted alienation.

Underhill v. Saratoga & W. R. Co., 20 Barb. 455 (N.Y. 1855); Prall v. Buckhartt, 299 Ill. 19, 132 N.E. 280 (1921); *Contra* Collette v. Town of Charlotte, *supra;* Battistone v. Banulski, *supra.*

But see Restatement of Property, Sec. 159, comment a, to the effect that possibilities of reverter are transferable.

able,[13] capable only of passing to his heirs.[14] No analogy exists between a bare possibility of a reverter and a lien, either legal or equitable. An obligation, which is a prerequisite of a lien is absent. How then can it be said that the parties, because they had knowledge that no lien could attach to the buildings, were also bound to know that there would be no right to claim a forfeiture of the building upon abandonment? To hold that the legislature of the State of Texas intended that the statute cover the situation here presented is to strain statutory construction beyond reasonable limits. Even if the reasoning be adopted as valid, its application is inconsistent if carried to its logical conclusion. The statute refers to *schoolhouses* and *grounds*. In these circumstances, if the statute would prevent forfeiture of *buildings* in a case such as the principal one, *quaere,* would it not necessarily also prevent forfeiture of *grounds?*

It was said that because the *donors* had knowledge that no lien could attach, they should not be permitted to declare a forfeiture of the building. Obviously, even in the absence of the statute, the donors would have had no right to declare a forfeiture either of the land or the buildings. No privity existed between them and the grantor. The grantor asserted his claim as a grantor, not by virtue of the fact that he was also a donor. He provided the basis for his claim in the deed. Only he or those in privity with him could have enforced such rights.

As heretofore noted the grantor retains only the possibility of a reverter when a determinable fee is created. Nothing can be said therefore, in favor of the argument that if the reverter clause applied to buildings, the grantor, and not the trustees, could forever control the location of the school. All of the control possessed by the grantor, except the right thereafter to enforce a forfeiture in a proper case, passed under the conveyance. The trustees could thereafter commit unlimited waste.[15] They could use the land for any purpose not incon-

[14] See notes 12 and 13, *supra,* and cases there cited. It has been held that a possibility of reverter will not pass by devise.

Presbyterian Church v. Venable, 159 Ill. 215, 42 N.E. 836 (1896). For general discussion of the topics in this note and notes 12 and 13, *supra, see* 2 Tiffany, Real Property, Sec. 314 (3d ed. 1939); 4 Thompson, Real Property, Sec. 2182–2188 (Perm. ed. 1940).

[15] Davis v. Skipper, 125 Texas 364, 83 S.W.2d 318 (1935); Walsingham's Case, 2 Plowd. 547, 75 Eng. 805. *But see* Dees v. Cheuvronts, 240 Ill. 486, 88 N.E. 1011, 1012 (1909), which holds that equitable waste by owner of base fee will be enjoined when contingency which will terminate his fee is reasonably certain to happen and owner is guilty of conscienceless use of his rights. This position is adopted by Restatement, Property, Sec. 193 (1936).

sistent with a use for school purposes. They alone could determine the duration of the estate. Until they abandoned the use of the land for the purpose specified in the deed, their control was absolute.[16] Upon abandonment, the law, not the grantor, would determine the rights of the parties. If they voluntarily accepted a title subject to divesture by their voluntarily acts, they alone should be charged with the consequences, in the absence of fraud.

The trustees had knowledge of the attitude of the Texas court with respect to things annexed to realty, together with knowledge that by the terms of the conveyance, the land if abandoned, would revert to the grantor and with it would pass all that had become a part thereof. If it would be a violation of trust to allow the buildings to become a part of the realty, because of the reverter clause, it would seem to follow that it would likewise be a violation of trust to expend public funds for land which would revert upon abandonment. A violation of trust, standing alone, should not prevent buildings, permanently affixed, from being treated as realty as between a grantor and grantee of a qualified fee. The grantor violated no principle of law or equity by inserting in the deed a clause recognized as valid and binding by the laws of Texas. Only by the exercise of the power of eminent domain could the grantor, against his will, have been compelled to create a greater estate than he voluntarily chose to transfer. By acceptance of the deed, the trustees limited their own freedom of action. It was an error in judgment, perhaps, but hardly a breach of trust. If a breach of trust there was, it was in the act of abandonment which was subsequent to the determination of the rights of the parties which had accrued when the transfer was made. Although it might be shown that by a taxpayers vote, the trustees were authorized to accept a qualified fee, the result as to the buildings should not differ. If such were the case, then the public would be in no position to complain because a building, erected upon land the purchase of which the same public authorized, became a part of that land.

Assuming that the trustees had erected the buildings upon land held in absolute fee, and then had executed a transfer clearly in breach of trust which was followed by a transfer by the grantee to a bona fide purchase for value, would it reason-

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[16] See note 15, *supra*.

ably follow that because there was a breach of trust, buildings which had theretofore been realty, magically became transformed into personalty, and hence would not have passed to the bona fide purchaser? If a grantor released his possibility of a reverter to the district, would buildings which by virtue of the Texas decisions were considered personalty, become realty because the limitation on the fee was removed? Clearly, it would seem that the manner of annexation and the intent of the parties at the time should govern, rather than subsequent unrelated and independent action by the trustees or another.

The only remaining question in the *Allen* case is the reference to public policy. In that regard it may be said that not every contract which is in any degree injurous to the public, or which in some degree may be a breach of trust, is contrary to public policy. If it were, then any public contract, fair and just at the time of execution, made in the public interest, which later proved to be improvident, would be void. Private persons would thus be forced to deal with the public at their peril with the ultimate result that no one would venture into a contract with public officials. The case of *Chappell* v. *Brockway*,[17] involved a contract for a monopoly in restraint of trade. The statement made therein concerning public policy should not be taken literally, but would seem to refer only to those contracts which are illegal or fraudulent, and not to those which might prove to be improvident. Before a contract can be said to be contrary to public policy a violation of some legal or equitable principle as laid down by the laws of a state in its constitution, statutes or judicial records, should in some measure be present. No such violations were present here.

From the above discussion of the *Allen* case the conclusion would seem to follow that the statutes of Texas were erroneously applied, and that the arguments advanced by the court are insufficient to sustain the result reached.

If the above conclusion is correct, then the application of the doctrine of stare decisis in the *Dickenson* case [18] lends little but moral justification for the result reached therein. An erroneously decided case is not validated because it is later followed, nor can it be said that the later case is valid because it adheres to that which is *per se* invalid. Therefore, if the decision in the

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17 21 Wend. 159 (N.Y. 1839).

18 As already noted, the court in the *Dickenson* case placed great reliance upon the decision in the *Allen* case. See *supra*. p. 42.

Dickenson case is to be upheld, it must be for reasons advanced there which are not present in the earlier case.

The statutes in effect in Texas at the time of the *Dickenson* case [19] did not differ materially from those mentioned above, and a similar application was made. In practical effect the arguments used by the court in the principal case add little to what was said in the *Allen* case. However it is of interest to note the fact that the Dickensons conceded that if the buildings were moved to another location (before abandonment) for use by the district they could not have prevented it.[20] In this connection the court stated: "In so far as the title to improvements is concerned, certainly if it be conceded that the trustees could move them to another location for use by the district, and plaintiffs could not have prevented it, they would not revert with the land to plaintiffs." As a concluding argument it was held that there was no evidence in the deed, or from any other source, of the parties' intention that improvements should become a part of the realty and revert with the land, and that the court would not read such an intention into the contract.

Analysis of these additional arguments shows that they are unsound.

First, a concession such as that made by the plaintiff would not seem to be broad enough to include a concession that the title to the buildings could not revert. The fact is that the buildings were not moved. No one would argue that the district did not have the right to remove the buildings so long as the title remained in the district, but it does not follow in law or logic, that because the district could remove that which was its own, title could not be divested by any act or omission by the trustees which would have the legal effect of terminating all of their interest in and to the lands and buildings. Once the title was divested, the right to remove the buildings vanished. The question for the court to decide was the question of the districts rights after abandonment, not what they might have done prior thereto.

The question of intent alone remains for discussion. The authorities are in harmony that as between grantor and grantee of real property, things permanently annexed thereto will be

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[19] Vernon's Annotated Civil Statutes, Art. 2748, 2752, 2754, 2756.

[20] The language in the opinion is ambiguous but it would seem that the Dickensons could not have intended to concede the right of the district to remove the buildings after abandonment since such an admission would have been broad enough to defeat the entire case.

treated as part thereof unless a contrary intent is shown and removal will not materially injure the freehold.[21] Here again the Texas court agreed, but cited *Eckstine* v. *Webb Walker Jewelry Co.*[22] wherein cases are collated which depart from the general rule. These cases were held to be applicable in some degree. Suffice it to say that none of the collated opinions is directly in point and if applicable at all, is remotely so and lends little if any support to the contention made.[23]

It was not argued, and it is doubted that is could be, that removal of the buildings would not have materially injured the freehold. Assuming therefore, that material injury would have resulted, it follows that the burden should not have been upon the grantor to show an intention that the buildings would not be treated as realty, but rather, that the district should have been burdened with the proof of intent that the buildings would be treated as personalty. It was a burden which the district made no attempt to assume and of which it was arbitrarily relieved by the court.

From the foregoing it may be concluded that no support is found for the minority view expressed by the Texas opinions. Discussion of the Kansas view is unnecessary since the statutes applied and the reasoning adopted are parallel and differ in no material respect from those already reviewed.[24]

The courts of Ohio apply the doctrine of trade fixtures, holding that school buildings are of that nature, and the district has a reasonable time in which to remove the buildings after abandonment of the land.[25] Definitions of trade fixtures show that this doctrine is arbitrarily and unreasonably applied.

In general, "an article so annexed as to be part of the realty is a trade fixture if the purposes of the annexation was to aid

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21 2 Tiffany, Real Property, Sec. 609 (3d ed. 1939), and cases therein cited.

22 178 S.W.2d 532 (Texas 1944).

23 The cases collated were all referable to a landlord and tenant situation and to buildings which could be removed without material injury to the freehold.

24 The Kansas statutes limited the powers of the board of education in much the same manner as in the *Dickenson* case. It was said that it would be an *ultra vires* act on the part of the school district to allow a reversion of the building since it would be a transfer without consideration and the grantors were bound to know that the board would be exceeding its power. It was further held that since the reversionary clause did not expressly include buildings the court would not extend the construction of the deed to effect a forfeiture thereof. See note 2, *supra.*

25 Phillips v. Board of Education, 12 Ohio App. 456 (1921); Burdette v. Jones, note 2 *supra. Cf.* Schwing v. McClure, 120 Ohio St. 335, 166 N.E. 230 (1929), (disregarding the trade fixtures doctrine and applying reasoning similiar to that employed by the Texas and Kansas courts).

in the conduct of a calling exercised for the purpose of pecuniary profit . . ." [26] The leading Ohio case on the question of fixtures is *Teaff* v. *Hewitt*.[27] While it does not define trade fixtures as such, it does distinguish them from other fixtures, holding that the nature of the thing annexed bears directly on the intent of the party annexing it. In this connection it was held: "When . . . a tenant erects expensive structures for carrying on his trade or business, which can be removed without their destruction or material injury to the freehold, the presumption is a rational one that it was not the intention of the tenant to make them permanent accessions to the freehold, and thereby donations to the owner of it."

Considering the general definition it is difficult to see how any analogy can be drawn which would compel a finding that school buildings, erected for the public purpose of education, are akin to trade fixtures. There is no element of profit involved in the operation of a public school, nor is there an element of trade. Public schools are a public service, tax supported, for the public benefit. The doctrine advanced in *Teaff* v. *Hewitt* would also seem to be inapplicable if used in connection with school buildings. That doctrine too refers to *trade* or *business* and to those annexations which may be removed without their destruction or material injury to the freehold.

If it be held that school buildings erected upon land subject to a reversionary clause are not realty, or trade fixtures, they must be personalty annexed to realty. However, to remain personalty after annexation they must be capable of removal without material injury to the freehold, and the parties must intend that they shall remain personalty. It has already been noted that removal without injury was a practical impossibility in the cases discussed, and the facts of those cases do not warrant any inference of intent of the parties that the buildings were not to be treated as realty. Therefore it would seem to follow that the buildings did not remain personalty. There remains but one logical conclusion, they were intended by the parties to be treated as realty, should have been so treated by the court, and they should have been held to revert with the land.

Perhaps this much should be said in justification for the reasoning of the minority courts. In many instances where

[26] 2 Tiffany, Real Property, Sec. 617 (3d ed. 1939) and cases therein cited.
[27] 1 Ohio St. 51, 59 Am. Dec. 634 (1853).

public funds are held by public agents, the courts feel a moral duty whenever possible to protect those funds from dissipation. However, when legal justification is absent and only a moral justification exists, the problem is one within the legislative field and beyond the judicial province.

It would serve no useful purpose to go into detail concerning the majority view, inasmuch as the courts which adopt it apply the generally recognized rules of real property which have heretofore been discussed, simply, and without difficulty, and allow the buildings to revert with the land.

There is, however, one case of interest which is worthy of brief discussion here since it presents an extreme application of the majority rule.

The board of education of a school district had insured the building which was subject to a reverter clause, for the "account of whom it may concern." The building burned and the land was thereafter abandoned for school purposes. The grantor asserted a claim to the proceeds of the policy. Thereupon the insurance company commenced an action in interpleader to determine its liability. The school district moved to dismiss the grantor's response. In deciding the motion in the grantor's favor it was held that the grantor had an insurable interest which consisted in its right to be reinvested with the fee simple title upon the happening of the condition which might terminate the qualified fee vested in the board; that the insurance fund stood in the place of the building and if abandonment had occurred, the reversioner having been reinvested *ipso facto* with the fee simple title, should have the entire proceeds.[28]

An analogous case in New York involved the proceeds of a condemnation award. A church building was subject to reversion upon abandonment for church purposes. The power of eminent domain was exercised to acquire the land for a reservoir site. The reversioner asserted a claim to the award made. As to the right of the church to the award, the court held: "The disuser, however, was a consequence, not a cause of loss of title by the plaintiff. The seizure was of the entire title, wherever resident, by a single act of appropriation. There was, therefore, no interval of time between the seizure of the rights of the heirs at law during which there could have been a reverter of title to the heirs because of a church disuser of the premises

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[28] Allemania Fire Insurance Co. v. Winding Gulf Collieries, *supra.*

necessarily consequent upon the seizure." [29] A similiar argument could have been applied with equal force in the interpleader action. In that situation the reversioners interest revested only upon abandonment. The fire preceded abandonment and when the estate reverted, there was nothing left but the land to revert to the grantor. [30]

A sound rule is expressed in Missouri to the effect that "conditions subsequent in a deed apply with equal force to the public as to private individuals." [31] Its application would not differ if applied to a fee on special limitation.

In New York some reason may have existed at one time which would have justified a legislative enactment prohibiting the reversion of school buildings built with public funds, but such a statute would no longer have any practical value. If retrospective, it would be unconstitutional,[32] if prospective it would serve little purpose since it is inconceivable that a school district would erect a large and costly building upon land held subject to a reverter clause, when the power of eminent domain is available.

There have never been any statutes in this state which expressly prohibit a reversion, and no such prohibition could be implied from those in effect without giving to them a strained judicial construction which, it is believed, the courts would avoid.[33]

Evaluating the arguments of the minority courts it appears that the compelling reason for their decisions was their concept of public policy. The courts of New York have often found it necessary to define public policy and it has been repeatedly held that "Whatever the term may imply in other jurisdictions, a state can have no public policy except what is to be found in its Constitution and laws . . . Therefore when we speak of the public policy of the state, we mean the law of the state,

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[29] First Church v. Croswell, *supra.*

[30] It should be noted that the time of the vesting of the estate in the grantor is material in cases similar to those cited in notes 28 and 29, *supra,* since if the grantee's interest is a fee on condition subsequent and there is no reentry by the grantor, it would seem that there would be little question as to the grantee's right to the fund.

[31] New Hebron School v. Sutton, *supra.*

[32] Webster Co. Board of Education v. Wynn, *supra.*

[33] Some question of doubt has been raised whether any such estate as a qualified or determinable fee can exist today in view of the statute of quia emptores. For discussion of the problem see Gray, Perpetuities, Sec. 31–40. However, most jurisdictions completely disregard the view there expressed as evidenced by cases cited in note 8, *supra.*

whether found in the Constitution, the statutes or judicial records." [34]

It is submitted that should a case such as the principal one be presented to the courts of this state for decision, the majority view should be followed, as there is no requirement of Constitution, statute, or judicial decision which would necessitate a departure from that view, and there is no compelling basis in unexpressed "policy" or rationale for adhering to a view demonstrably so unsupportable in law or logic as that expressed by the Texas, Kansas or Ohio courts.

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[34] Straus & Co. v. Canadian Pac. Ry. Co., 254 N.Y. 407, 173 N.E. 564 (1930).

WHERE CAN A STUDENT VOTE?

By JOHN J. MOONEY & J. ROBERT LaPANN

The post war migration of education-seeking veterans of World War II to American colleges and universities has given rise not only to familiar and much discussed social and economic problems, but also to a rather unique legal question, the answer to which may seriously affect the political life in our smaller college towns. The prewar student was a young man not yet old enough to vote, invariably unmarried, and without many cares or responsibilities. He was mainly supported by his parents and lived at or near the college while school was in session, returning to his parental home during vacations and after graduation. Those few of voting age returned to vote in the district in which they lived with their parents. The postwar student is much older, more mature, and carries greater responsibilities. He is usually self-supporting; and in many cases, he is married and has a family of his own. Great numbers of these student veterans have descended on our college towns, have found housing accommodations for themselves, their wives and their families, and live there throughout the year. A great many of today's students have no home other than the place where they reside near their college or university. This is the situation which presents the legal question with which we are concerned: Have these students established a legal residence which will entitle them to vote in the college community?

For the purpose of determining voting qualifications, it is well established that the term "residence" is synonymous with the term "domicile." [1] Thus the problem involves the elements which go to make up the legal concept of domicile. It also involves the interpretation and application of Article II Section IV of the Constitution of the State of New York. This provision reads as follows:

"For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or

[1] Matter of Rooney, 172 A. D. 274, 157 N. Y. Supp. 132 (1916).

absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison."

Section 151 of the Election Law is essentially the same except that the first phrase reads "For the purpose of registering and voting, ..." There are also two additional sentences at the end of Section 151 which provide the procedure whereby persons belonging to the enumerated classes may file their statement of domicile. But since Section 151 has the same effect as the constitutional provision, and since the courts have interpreted them in the same way, our treatment will consider only Article II Section IV of the Constitution.

This provision was not contained in the New York Constitutions of 1777 or 1821, but first appeared in the Constitution of 1846. There seem to have been no cases involving it, but the courts have related that "it received a practical construction for 21 years." [2] During the Constitutional Convention of 1867, the draft of this provision which the committee on suffrage submitted to the convention for consideration omitted the phrase "nor while a student of any seminary of learning." An amendment was offered to include this phrase. In the ensuing debate, the following exchange occurred, and it perhaps best illustrates the opposing concepts of the meaning and construction of this provision:[3]

Mr. Greeley:

"The committee very carefully considered this matter, and decided that a man's residence was what we could not here determine. Here is a young man who goes to school, perhaps his home is where he has lived all his life time, and his residence is there. He has a right to go home and vote. Here is another young man who is sent to college, who has no other home than where he is living as a student; he makes that place his home. He may be there four years, having

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[2] In Re Ward, 29 Abb. N. C. 187, 20 N. Y. Supp. 606 (1892).
[3] Debates, Constitutional Convention of 1867, p. 569.

no other home than that; and, if you restore this article (the amendment), he cannot vote at all. I hope no such proscription ever will be permitted, of those who are trying to get an education. We have decided that ignorance shall not disqualify a man from voting, and I trust we shall not enact a provision which will disqualify a person because he is seeking an education. I hope this clause therefore, will be allowed to stand."

Mr. Andrews:

"I am in favor of the restoration of this clause, and I do not think the suggestion of the gentleman from Westchester (Mr. Greeley) is well founded, because in the case which he last supposes, if a student had no other residence than where he is attending college, and if the intention is with him to remain in that place although he might be a student there, he would have a right, notwithstanding the insertion of this clause, to vote there."

Mr. Merrill:

"Does the gentleman understand that by the provision of the present constitution (1846) a man may gain a residence by being a student in college?"

Mr. Andrews:

"Oh, unquestionably. It simply determines that, while a young man is at school, the fact of his being at school shall not affect the question of his residence. That, as I understand it, is the entire scope of the section. Now, striking out this section is not objectionable on the ground taken as I understand it in the minority report, because if struck out then it would not allow students temporarily away from home at school to vote in the place where they might happen to be; but I agree with the gentleman from Albany (Mr. Harris) that this has furnished heretofore the rule in such cases, and it had better not be abandoned, although I do not suppose it protects any substantial right, whether it is in or out."

The convention adopted the amendment, accepting this construction by Mr. Andrews. Later, a motion to reconsider the

amendment was voted down.[4] The provision appeared unchanged in the Constitution of 1894, and at the Constitutional Convention of 1938 it was renumbered but adopted in the same form.

The constitutional provision covers many situations other than those dealing with students. While cases such as those involving voting rights of members of the armed forces, inmates of asylums, institutions, etc. may be valuable by way of analogy, in the interest of time and space, this article concerns itself principally with the law applicable to the voting status of students.

The first judicial test of the voting rights of postwar student veterans was made in *Matter of Robbins v. Chamberlain,* 297 N.Y. 108, decided October 30, 1947. The case involved four hundred sixty-five veterans and their wives occupying apartments in a housing development called "Shanks Village," formerly the Army's Camp Shanks, located in the Town of Orangetown, Rockland County, N. Y. The development was located about twenty miles from Columbia University, under whose control the apartments had been placed by an agreement between the university and the Federal Public Housing Authority. The university was authorized to rent the apartments only to student veterans; the students agreed to relinquish their apartments on request when their student status terminated. All the occupants were married and lived there with their wives and families, and Shanks Village housed approximately fifteen hundred families.

The petitioner Robbins was a candidate for office in the Town of Orangetown. He lived at Shanks Village with his wife and their six months old child. Both he and his wife were free lance writers and earned a substantial part of their income writing. He attended a four hour session at Columbia University one night a week. Most of the other students worked full or part time in or near Orangetown or in New York City. Those children at Shanks Village who were old enough to attend school went to classes in the Town of Orangetown. The students and their wives bought most of their food and necessities in Orangetown. Students and their wives received their mail at their Shanks Village addresses, which addresses were also listed as their residences on such things as operator's licenses, auto registrations, and insurance policies.

[4] Debates, Constitutional Convention of 1867, p. 620.

After the Board of Inspectors of Elections of the Town of Orangetown denied these students the privilege of registration, this proceeding was instituted to compel registration of the petitioners. The lower court reached the rather startling conclusion that the wives, but not the student husbands, were entitled to vote at Orangetown, thus holding the wives domiciled apart from their husbands. The court said, "Since the student petitioners had to be enrolled students at Columbia, or some other school with which Columbia had contracted, before they could be assigned apartments at Shanks Village, they came to their present abodes as students, and because they were students and while being such they could not acquire a voting residence at Shanks Villiage but retained the voting domicile they had before becoming students. As students they could not lose their voting domicile nor acquire a new one in the district where they were students, for this is what the Constitution of the State provides." [5]

The court held that the non-students, the wives, were under no such restraint and were in the same legal position, with regard to registering and voting, as any other citizens, many of whom have month to month tenancies or tenancies at will or are engaged in occupations where they are subject to transfer by their employers at any time. The court applied Section 61 of the Domestic Relations Law which provides that the domicile of a married woman shall be established by the same facts and rules of law as that of any other person for the purpose of voting and office holding.

Both parties appealed, and the Appellate Division, by a divided court, affirmed without opinion.[6] By permission of the Appellate Division, both parties appealed to the Court of Appeals, which reversed that part of the order denying the student petitioners the right to register and vote.

In holding that the student petitioners and their wives were entitled to vote in the Town of Orangetown, the court emphasized the fact that each of these petitioners was the head of a family unit, and that all occupied the apartments as separate family domiciles. The way of life of these men was distinguished from the semicloistered college life conventional before the war. Quoting the case of *Silvey v. Lindsay*, the court said that the mischief aimed at was "The participation of an un-

[5] Matter of Robbins v. Chamberlain, 189 Misc. 1020, 76 N. Y. S. 2d 624 (1947).
[6] Matter of Robbins v. Chamberlain, 272 A. D. 1034, 74 N. Y. S. 2d 830 (1947).

concerned body of men in the control through the ballot box, of municipal affairs in whose further conduct they have no interest, and from the mismanagement of which through the officers their ballots might elect, they sustained no injury." The court said that these men were not within that mischief. They were family men, not college boys away from their parental homes. Shanks Village bore little resemblance to an old-fashioned college community, but was more like the kind of new-fashioned company owned housing project, often found near large industries. Petitioners' tenure at Shanks was temporary or indefinite only in the same sense as the tenure of occupants of city apartment houses.

This case of *Matter of Robbins v. Chamberlain* involves the application of the law of voting residence to a new set of facts. The decision seems to indicate a more liberal trend in interpretation of the constitutional provision. The court permitted the establishment of a voting residence even though there was no intent to remain permanently in the voting district and even though the tenure there was not strictly indefinite, but was to a certain extent limited. This reflects a more liberal concept of the intent necessary for a student to establish a domicile for voting, in that an intent to stay beyond the term of study is no longer required. On the question of intent, the court accepted fewer facts than have heretofore been required in most cases. Except for Robbins and a few others, most of these petitioners submitted no proof as to where they came from originally, their jobs, or other collateral facts. They rested their cases on little more than the declaration that they were married and living at Shanks with their wives and families. The court's decision perhaps can be explained by the weight attributed to the fact that the petitioners were family men living with their families, and, in that respect, different from so called "college boys." A review of the more important New York cases involving Article II Section IV may be helpful in better understanding the significance of this decision.

Silvey v. Lindsay, 107 NY 55, decided in 1887, involved the application of an inmate of an Old Soldiers' Home to register and vote at the annual town meeting in the town where the institution was located. He showed no facts to prove that the town was his home except his presence there as an inmate in the Old Soldiers' Home. His declaration was that he had remained there with the intention at all times of making his

residence in the institution so long as he was permitted to remain an inmate. The court held that the question in each case remained, as it was before the adoption of the constitutional provision, one of domicile or residence to be decided upon all the circumstances of the case. The provision disqualified no one; conferred no rights upon anyone. It simply eliminated from those circumstances the fact of presence in the institution named or included within its terms. It settled the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declared that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere. Although this case did not involve a student, the opinion is important because it was the first judicial interpretation of the constitutional provision.

In re Ward, 20 NY Supp 606, decided in 1892, was an appeal from an order granting a stay of proceedings to appeal an order striking from the voting registry the names of four students who attended St. Lawrence University at Canton, New York. Each had assumed his place of abode in Canton before school started. None of these abodes were connected with the college. One student was married, and all had outside employment not connected with their school work. The order was sustained on other grounds, but the court, in dicta, said, "It is not essential to their right to vote that at the time they came to Canton they had determined to make that place their home for the remainder of their lives. It is sufficient if, leaving and abandoning their former residence, they came to Canton to make that town their residence, leaving to the future to determine whether they shall, as many others have done similarly situated, enter the profession of the law, or ministry, or medicine, or some other business avocation in that town at the end of their college careers." Note the resemblance between the approach of the court in this case and in *Matter of Robbins v. Chamberlain.*

Matter of Goodman, 146 NY 285, decided in 1895, involved a petition by a student at Union Theological Seminary in New York City. He resided in the seminary building, 1 South Hall, at 41 East 69th Street. The petitioner was born in 1863 and lived with his father in their family home in New York City until 1883 when he left to travel in the West for seven years. His father died in 1890, and the petitioner entered Columbia University as a junior in 1891; while in attendance there he

boarded at various places in New York City. His old family home had been demolished. In 1893 he moved all his effects to the seminary, and resided there continuously thereafter. The petitioner was unmarried, 32 years old, and did mission work for the Park Presbyterian Church of New York, for which he received a salary. His declaration was that he had no intention of changing his residence. Presumably the rooms rented to students were to be occupied only during the prescribed period of study, and not permanently as a residence.

The court, in denying Goodman the voting franchise, found nothing to show any change of residence beyond his temporary presence at the institution for a period of study, and concluded that, "Usually, perhaps always, the voting residence remains unchanged until a new residence is actually acquired, but there can be no such acquisition merely by an abode as a student in an institution of learning. Something else, beyond that fact and wholly independent of it, must concur with and be manifested by resultant acts which are independent of the presence as a student in a new locality." This language of the court has been widely quoted, and it supplies an excellent rule to apply to a set of facts. There has been criticism, however, of the manner in which the courts apply the rule, and of their reluctance to recognize outside, independent facts when they are presented.

In *Matter of Garvey,* 147 NY 117, also decided in 1895, the court stated and followed the rule it had formulated in the *Goodman* case. This case involved four students at the General Theological Seminary of the Episcopal Church in New York City. All were single and lived in one of the seminary buildings. It appeared that these men could continue to live at the seminary so long as they wished to study theology. The court denied the voting franchise to three of the students, but held that the name of one, a student from Virginia named Barry, was improperly stricken from the registration rolls.

Two years prior to this election, Barry had written to the voting registrar in Warrenton, Virginia, his former home, and informed him that he no longer considered himself a resident of Warrenton, and asked the registrar to strike his name from the voting list. Barry had also written to Bishop Potter of New York, informing the Bishop that he had made New York City his home and had no intent to establish a residence, legal or ecclesiastical, anywhere else. He asked to be considered a

resident of that diocese. The court held this fact sufficiently independent and outside his presence as a student in the new district to permit him to establish a voting residence there.

The court held that unless the *Goodman* rule were followed, the constitutional provision would be nullified. "It may be urged that the enforcement of the rule will render it well nigh impossible for a student to establish a residence in a seminary of learning, but the very obvious answer is that the letter and spirit of the Constitution contemplates such a result."

In 1900, the case of *Matter of Barry,* 164 NY 18, was decided. This involved the petitions of several students at a Catholic Seminary where they were studying for the Roman Catholic priesthood. Each student was required to renounce his former home, and sever his family ties when he entered the seminary. Their stay at the seminary was indefinite, being subject to transfer by their superiors. The court, in denying the petitioners the right to vote, again followed the *Goodman* rule and said, "The plain reading of the Constitution is that a sojourn in a seminary of learning has no effect whatever, one way or the other, on the question of legal residence for the purpose of voting."

Between 1900 and 1925, three cases involving the right of a student to vote were decided by the lower courts in New York.[7] All three concerned students at Roman Catholic Seminaries, and the facts were similar to those of *Matter of Barry.* In each case the court followed the rule of the *Goodman* case and refused to permit the students to vote where the seminary was located.

Matter of Blankford, 241 NY 180, decided in 1925, concerned a petition by seventeen students at the Roman Catholic Seminary of St. Andrews-on-the-Hudson to compel their registration as voters in the Town of Hyde Park. The petitioners relied on two circumstances to distinguish their case from that of *Matter of Barry:*

(1) they each had notified the commissioner of elections in their respective domicile of origin that such domicile had been abandoned and a new one established.
(2) they filed affidavits with the inspectors of elections at

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[7] Matter of McCormack, 86 A. D. 362, 83 N. Y. Supp. 847 (1903); Matter of Gardiner, 101 Misc. 414, 167 N. Y. Supp. 26 (1917); Matter of Gardiner, 183 A. D. 491, 171 N. Y. Supp. 327 (1918).

Hyde Park that they intended to reside indefinitely at St. Andrews-on-the-Hudson.

The court rejected the first argument because renunciation of the old home is ineffective until a new one is established. The court ruled that the second ground was equivalent to a statement that they intended to stay at the seminary and complete their course of study. This was not sufficient. The court said, "There must be evidence that irrespective of residence in a seminary of learning, the place in which the seminary is located has been adopted as a home."

The correctness of these seminary decisions cannot logically be challenged, if the test set forth in the *Blankford* case is accepted. The seminary is clearly the student's home, and he has severed his family ties, but there are no facts available by which he can prove his residence after eliminating the fact of presence for study. Yet in cases where such facts have existed, the court has seemingly been unimpressed.

In *Matter of Watermeyer v. Mitchell,* 275 NY 73, decided in 1937, the petitioner lived in a dormitory of Columbia University but was employed full time as a teacher at Brooklyn College. He took one course at Columbia in order to keep his dormitory room. He was born in Germany in 1907, arrived in the United States in 1925, moved into a Columbia dormitory in 1926 when his parents moved to South America, where they still reside. From 1926 on the petitioner lived continuously in a Columbia dormitory. He was living there in 1933, the year in which he was naturalized. He stated his intention to remain indefinitely at that address. Despite all these facts, the court was unable to find the petitioner domiciled at Columbia.

The constitutional provision was correctly interpreted as excluding from consideration presence as a student. Then the court, purporting to follow the *Blankford* case, stated that severance of family ties was irrelevant. (In the *Blankford* case, however, the severance of family ties was required by the religious order and was referable to status as a student; here, it was an independent fact.) The statement of intent was interpreted by the court as no more than a declaration of his purpose to have no other habitation while his course of study continued.

In a strongly logical dissent, Justice Finch stated the rule of *Matter of Garvey* (which originated in *Matter of Goodman)* and declared that here there were sufficient facts to establish a

domicile irrespective of residence in a seminary of learning. Justice Finch also related the original meaning of the constitutional provision, and pointed out that the petitioner had renounced his German citizenship, and that this decision left him without a vote.

Matter of Watermeyer v. Mitchell was the most recent decision of the Court of Appeals prior to the case of *Matter of Robbins v. Chamberlain,* and as can be seen, the two are widely divergent. It is interesting to note that of the judges who decided the former case only Loughran, Chief Justice, was present for the latter case.

In 1946, a student at Syracuse sought an order compelling the Inspectors of Elections to add his name to the register of voters. The petition was dismissed on procedural grounds, but the Supreme Court Justice recognized the existence of a problem of voting residence among student veterans. In laying down a guide to assist students in deciding where they were domiciled, the court concluded that the test was "Where is the student's home?" [8] This is oversimplification perhaps, but it does sum up the problem.

Although the student veteran situation is nationwide, there are no reported cases in other states dealing with this postwar problem of voting residence. For a comparison, therefore, we must consult the law as it existed before the war. This may also give us a clue as to why the problem has not received a recent judicial test without the state.

Eighteen states [9] have provisions in their Constitutions which are essentially the same as Article II Section IV of the New York Constitution. Four other states [10] have statutory provisions which are essentially the same. The weight of authority has construed these provisions to mean that mere presence in the college as a student shall not operate to confer voting rights nor deprive him of such rights, if he had any, in the home town. There must be other facts.[11] Vermont [12] has added to its statutory provision a clause which permits a student to adopt the town where the college or seminary is located as his place of

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[8] Matter of Hoffman v. Bachman, 187 Misc. 799, 65 N. Y. S. 2d. 107 (1946).

[9] Ariz., Cal., Colo., Idaho, Kan., La., Me., Mich., Minn., Mo., Mon., Nev., N. M., Ore., Penn., S. C., Va., Wash.

[10] Ala. Code, Sec. 366 (1928); N. H. Rev. Laws, c. 31, Sec. 10 (1943); Utah Rev. Stat., Sec. 25.2.14, Sub. 2 (1933); Public Laws of Vermont, Sec. 87 (1933).

[11] See cases collected in Kennan on Residence and Domicile, Sec. 514, p. 884 (1934).

[12] Public Laws of Vermont, Sec. 87 (1933).

residence by filing in the office of the clerk of such town his declaration to that effect. Several states have statutory or constitutional provisions which deal with the gain or loss of voting right by persons in the service of the state or United States, but make no mention of students at institutions of learning.[13] Ohio provides specifically that a student shall have voting residence in the county from which he came. There can be no residence in the county where the institution of learning is located unless the student has the intention of continuing to reside in such county after he ceases to attend the institution of learning.[14]

Those states which have neither statutory nor constitutional provision are governed by the traditional concept of domicile, i.e., domicile established by actual residence plus an intent to make the place a home for an indefinite period of time.

Concerning the point with which this writing is interested, the voting residence of a student who has abandoned his former home but is not certain as to the place of his future residence, the weight of authority holds that he may vote at the college town.[15] This is true of the states with the common law rule of domicile, and the rule has even been applied to theological students in a state with a constitutional provision like that of New York.[16] This trend toward facilitating suffrage for students was noted by Professor Wharton as early as 1905.[17] There are cases to the contrary, however, and Professor Herbert F. Goodrich of the American Law Institute, referring to the gain or loss by a student of voting residence, was prompted to write, "on that point the law has been left in a very confused state." [18]

The determining factor found in most of our New York decisions seems to be the courts' concept of the ultimate purpose of the constitutional provision. That concept has been expressed by the court in *Silvey v. Lindsay* (supra) in holding

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[13] Conn. Gen. Stat., Sec. 565; Ill. Const. Art. 7, Secs. 4, 5; Ind. Const. Art 2, Secs. 3, 4; N. J. Const. Art. 2, pt. 1 (1884); Tex. Const. Art 6, Sec. 1.

[14] Ohio Gen. Code Sec. 4785–33a.

[15] Cases collected and discussed in the following; Joseph H. Beale, The Conflict of Laws, Vol. I, Sec. 22.8, p. 176 (1935); Stumberg, Principles of Conflicts of Laws, p. 21, 27 (1937); Restatement, Conflicts of Laws Sec. 18 (1934); 20 C. J. p. 72; 20 C. J. S. Sec. 22; See also Wolcott v. Holcomb, 97 Mich. 361, 23 L. R. A. 215, 56 N. W. 837 (1894); Peo. v. Osborn, 170 Mich. 143, 40 L. R. A. (N. S.) 168, 135 N. W. 921 (1912); Anderson v. Pifer, 315 Ill. 164, 146 N. E. 171, 37 A. L. R. 138 (1924).

[16] Chomeau v. Roth, 230 Mo. App. 709, 72 S.W.2d. 997 (1934).

[17] Wharton, Conflict of Laws, 3rd. Ed., Vol. I, Sec. 48, p. 108.

[18] A. B. A. J., Oct. 1928, p. 538.

that the purpose was to prevent the participation of an unconcerned body of men in the control through the ballot box of municipal affairs in whose further conduct they have no interest. On the other hand, the right to vote is an important feature of our democratic way of life. It must not be treated lightly. These two considerations of public policy played a not unimportant part in the court's determination of the *Robbins* case. The court had to decide that these student veterans were sufficiently established in the Town of Orangetown to be considered residents. Yet there was no pretense that any of them intended to remain there beyond their course of study. If Orangetown was their home, it was a transitory one at most, and whether they were an unconcerned body of men within the *Silvey v. Lindsay* definition is not an easy question to decide.

The possible immediate result of the *Robbins* decision is clear. In some larger cities where the elections are close, the votes of students and their wives might well be the balance of power. In smaller college towns, the number of students and their wives could easily exceed the number of inhabitants. In either situation, the student vote might decide the local election. Both of these situations, assuming arguendo that they are undesirable, are predicated upon the supposition that students would vote as a bloc. On most issues, this is extremely unlikely. In view of the fact that New York State has over eighty colleges and universities, it is apparent that there would be occasional opportunities for some irresponsible groups to seize control of municipal affairs in college towns. Fortunately, student veterans have proven themselves anything but irresponsible.

It is difficult to estimate the future implications of the *Robbins* decision. The factual situation it presents may be of short duration, since the proportion of student veterans in our colleges is already decreasing. Yet is is possible that the situation may continue. Universal Military Training, if enacted, would probably produce older, more worldly-wise, self-supporting students. Congress is holding hearings on a new Selective Service Act which would entitle peace-time draftees to educational rights under the G I Bill. Either of these programs would extend the situation presented in the Robbins case. In addition, sociologists are emphasizing the desirability of younger marriages, at a time when the modern world requires a longer education. If, for any of these reasons, the situation continues, the *Robbins* case will be a guide. The decision still leaves open

the question of whether the court would permit an unmarried student who is a veteran and self-supporting but who lives at a fraternity house or college dormitory, to vote in the college town if it appears that he has no other home. There are no cases in point. In view of the *Robbins* decision, it is probable that the court would not deny such a student the right to vote in the college town if he showed facts to establish a change in domicile.

SOLDIERS' AND SAILORS' WILLS IN NEW YORK (PART I)

QUENTIN E. GRANT AND GEORGE V. PALMER

On May 6, 1942, amended Section 16 of the New York Decedent Estate Law [1] became effective, substantially revising the statutory authority in New York for posthumous disposition of property by wills not made in conformity to the requirements of Section 21, D.E.L., the organic "wills act" of the state.[2] The purpose of this article is to examine new Section 16 to determine the construction likely to be placed upon selected portions of it by the courts. This examination will be accomplished in some instances by reference to decisions construing former Section 16 and a similar provision in the Revised Statutes of 1829,[3] and also by reference to certain cases decided by the English courts under analogous statutes. In other instances, it has been found necessary to rely almost entirely upon the holdings of courts of American jurisdictions other than New York in view of the fact that Section 16 as it stands today contains provisions never before contained in a New York statute of this type and never construed by the courts of this State.

Before dealing with the New York law in particular it may be desirable to review briefly the historical background of

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[1] "No nuncupative or unwritten or holographic will, bequeathing or devising personal or real estate, shall be valid, unless made by a soldier or sailor while in actual military or naval service, or by a mariner while at sea and when made in the following manner:

(1) A nuncupative oral will made within the hearing of two persons and the execution and the tenor thereof proved by at least two witnesses; or

(2) A holographic will when written entirely in the handwriting of the maker even though the same be unattested.

Any such disposition of property by a soldier or sailor shall become invalid and unenforceable upon the expiration of one year following his discharge from military or naval service provided he possesses testamentary capacity at the time of such expiration; if, however, he shall lack testamentary capacity at the expiration of one year from the date of such discharge, it shall continue to be valid and enforceable until the expiration of one year from the time he shall have regained testamentary capacity." L. 1942, c. 688, sec. 1, eff. May 6, 1942.

[2] "No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea." L.1909, c. 18; Consolidated Laws, c. 13, art. 2, sec. 16.

[3] R.S. (1829) pt. 2, c. 6. tit. 1, art. 2, sec. 22.

the special privileges bestowed on soldiers, sailors, and mariners with respect to the making of testamentary dispositions.

The Roman law, during the period of Caesar's campaigns, extended the privilege of making nuncupative wills first to soldiers and later to mariners.[4] And from the Roman system the principle was incorporated into the English law by section XXIII of the Statute of Frauds enacted in 1676.[5] While that statute [6] generally restricted the common law in respect to oral wills, it provided that soldiers and sailors might dispose of their personal property in the same manner as theretofore, meaning, of course, by using any mode of testamentary disposition which would have been regarded as valid prior to the passage of the statute.[7]

In New York, prior to 1787, oral testaments were upheld as a general mode of testamentary disposition. A restriction was placed on oral testaments by an act passed in 1787.[8] Then came the Revised Statutes of 1829 which did away with whatever remained of the law of oral testaments, making an exception, however, in the case of a soldier while in actual military service or a mariner while at sea.[9] In 1909, when the present Decedent Estate Law became chapter thirteen of the consolidated laws, the portion of the Revised Statutes referred to above was re-enacted word for word and became Section 16 of the Decedent Estate Law.

The wording of the statute remained the same until the amendment of 1942.[10] As is evident from the statute as set forth in note 1, *supra,* the wording of the section was completely altered and several new provisions were added.

Throughout this article, the purpose of the statute should

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[4] Gaius, Book 2, Sec. 101; Digest, Lib. 29, Title 1.

[5] 29 Car. II, c. 3 (1677). See post notes 18 and 19.

[6] *Id.,* Sections XIX-XXII.

[7] Before the Statute of Frauds, anyone in England could make a will of personalty by oral declaration or an unattested writing. Under the Statute of Frauds the unrestricted right to bequeath personalty by oral disposition was confined to cases where the value of the estate bequeathed did not exceed thirty pounds. Where the value was greater there were imposed the additional requirements that there be witnesses and that the testator be *in extremis* in order that an oral disposition have validity. Following the Statute of Frauds, the English law in this respect remained substantially unchanged until adoption of the Soldiers and Sailors Wills Act of 1918, 7&8 Geo.5, c. 58, which extended the scope of nuncupative wills to include devises of realty.

[8] 2 Laws of New York, 1787–1789, c.47.sec. 21. This statute almost identical with English Statute of Frauds, note 7, *supra.*

[9] "No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea."

[10] *Supra,* note 1.

be kept in mind. It is well stated in *Hubbard v. Hubbard:* [11] "The imminent dangers, the diseases, disasters and sudden death, which constantly beset soldiers and sailors; the utter inability oftentimes to find the time or means to make a deliberate and written testamentary disposition of their effects, seems, at all times, to have made them a proper exception to the operation of the rule which the wisdom of later times has found it expedient, if not absolutely obligatory, to apply to all others."

I

"No nuncupative or unwritten or holographic will, bequeathing or devising personal or real estate, shall be valid, **unless made by a soldier or sailor while in actual military or naval service, or by a mariner while at sea . . .**"

The determination of the meaning of "actual military service" and "mariner while at sea" has been the office of many reported cases. While these phrases seem incapable of exact definition, a review of several leading cases, both English and American, will serve to throw some light on their meaning under the New York law.

A. *English Case Law Involving "Actual Military Service"*

In *Drummond v. Parish* [12] the Director-General of Royal Artillery had died in England in 1843. Thereafter a holographic document dated June, 1842, and in the deceased's handwriting, was found. It was urged in support of probate that deceased was an officer on active duty, and subject to military law and overseas service and with command of troops both abroad and in England. The argument offered in opposition was that the statutory exception applied only to soldiers in actual warfare or in such situation as to be unable to comply with the formalities ordinarily required. The Court held that the deceased was not in actual military service, construing the exception to be confined to those *"on an expedition,"* and thus placing a limitation on the possible broad interpretation of the phrase "actual military service."

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[11] 8 N.Y. 196 (1853). That the reason imports a limitation, see David, New York Law of Wills, sec. 426, p.705:"The reason for allowing soldiers and mariners to make oral testaments is evidently their peculiar professional or vocational status; and hence where they are surrounded by the same conditions as are persons in general, they should not be accorded any superior privilege in respect of testamentary disposition of property."

[12] 163 Eng. Rep. 812 (1843); 3 Curt. Ecc. 522.

A modification of the test to be applied was advanced in 1901, in *Goods of Hiscock.*[13] In this case decedent had volunteered for service in the war being waged in South Africa. Pursuant to orders he proceeded to Chichester barracks, after passing a medical examination, to be processed for shipment. There he made an oral testament prior to embarkation. In admitting the will to probate as made in "actual military service," the court said that the following test should be applied: "Has the soldier taken some step, at the time he makes his will, toward joining the forces in the field?"

In later cases between 1902 and 1926 the test in the *Hiscock* case was construed to mean that a will is made in "actual military service" if made after the soldier receives orders for foreign service.[14]

The approach was considerably broadened in 1941 by the decision in the case In re *Estate of Spark.*[15] Here an oral testamentary disposition was made by deceased to another soldier while stationed at a camp in England. Shortly thereafter, during an air raid on the camp, he was killed. The will was admitted to probate, the court holding that the present scope of military operations is so large, that a soldier in a camp in England, even though not under overseas shipment orders, is a mark for enemy action and is in "actual military service." [16]

B. American Case Law Involving "Actual Military Service"

The reasoning of *Drummond v. Parish, supra,* was followed by American Courts in early decisions involving the American counterparts of the English Statute of Frauds. In the leading case of *Leathers v. Greenacre* [17] the decedent was a Union

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[13] [1901] P. 78.

[14] Gattward v. Knee, [1902] P.99; Stopford v. Stopford, 19 T.L.R.185; In the Goods of Gordon, 21 T.L.R.653 (Prob. 1905); *In re* Booth, [1926] P.118. See also Sections 1 and 2 of the Soldiers and Sailors Wills Act of 1918, 7&8 Geo. 5,c.58. Section 1 provided: "In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that section eleven of that Act authorizes and always has authorized any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, although under the age of twenty-one years." Section 2 provided: "Section eleven of the Wills Act, 1837, shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section."

[15] [1941] P. 115, [1941] 2 All Eng. Rep. 782. *Cf.* In the Estate of Gibson [1941] P. 118.

[16] *See* In the Estate of Rippon [1943] P. 61, 1 All Eng. Rep. 676.

[17] 53 Me. 561 (1866).

soldier on detached service in winter quarters in Virginia at the time of writing a testamentary letter. Applying the "on expedition" test, the court said that "expedition" was not restricted to that movement of troops immediately preceding the actual battle, but that it was enough that the testator had gone into enemy territory and was encamped among a hostile population.

In *Bottsford v. Krake,*[18] a New York court found decedent to be in actual military service while with the Union forces in the area of active operations in Virginia. An interesting feature of this case involved the contestant's argument that even in the case of a soldier's or sailor's will, validity depends on the testator being *in extremis* at the time of making.[19] The court said it was not necessary to decide whether "actual military service" was the only requirement, since the decedent was also *in extremis,* not by reason of sickness or disease, but because of imminent danger of death inherent in constant engagement in battle. An earlier case [20] had held that a mariner while at sea had also to be *in extremis* in order to make a valid nuncupative will. Later cases have disregarded such requirement and today it is apparent that it is no longer necessary that a testator be *in extremis* for his oral will to be valid.[21]

The rule as set forth in *Leathers v. Greenacre, supra,* continued in force during the period between the Civil War and World War I. During World War I, nuncupative dispositions were held valid when made in combat areas overseas. For instance, in *Matter of Mason,*[22] decedent made oral declaration disposing of his property on the night before his regiment attacked the Hindenburg Line in France. In dictum the court said that an oral will need not be made in immediate apprehension of death, arising from circumstances equivalent to his being *in extremis,* but that if mere apprehension of death was essential, as claimed by contestant, certainly this soldier was in apprehension of death. And again, in *Matter of Miller,*[23] decedent, a soldier killed in France in 1918, made three oral declarations disposing of his personalty, two of them while in camp in South Carolina awaiting overseas shipment, and the other

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18 1 Abb. Pr. (n.s.)112 (N.Y.1866).
19 *See ante,* note 7 as to *in extremis* requirement in English Statute of Frauds.
20 Hubbard v. Hubbard, 8 N.Y.196 (1853).
21 Matter of Mason, 121 Misc. 142,200 N.Y.S.901 (1923).
22 *Id.*
23 134 Misc. 671,236 N.Y.S.529(1929).

while on the front in Belgium. In finding a valid nuncupation, the court took all three declarations into account and seemed to treat them as one since they were of the same tenor. However, it was indicated that the ones made in South Carolina would have been sufficient standing alone.

Another line of cases, of which the following are typical, held oral testamentary dispositions valid where made prior to embarkation for foreign service.

Deceased, in *Matter of Mallery,*[24] made his oral will during October, 1917, while a soldier at Camp Dix, N.J. He left Camp Dix for France on January 20, 1918, and on that day made another oral will of same tenor. It was said by the court that it is not necessary that a soldier be actually engaged in battle or mortally wounded before he can make a valid nuncupation. "Where the soldier has departed or is about to depart to that which he thinks is death, that is the time when he may make his oral will."

In *Matter of Stein,*[25] decedent was a soldier embarking at Hoboken, N.J., in June, 1917, for overseas service with his regiment. At that time he made an oral disposition of his property which was held valid by the Court.

It seems that the last two decisions define the limit beyond which the American courts have been unwilling to go in holding a soldier to be in "actual military service" for the purpose of nuncupation. This is illustrated in *Matter of Dumont,*[26] in which the decedent had returned from France shortly after the Armistice. About a week after his return, and while stationed at Ellis Island awaiting demobilization, he made an oral will. It was held that the decedent was not in "actual military service" within the meaning of former Section 16, D.E.L., even though he might have been ordered to join the Army of Occupation or the American Expedition to Siberia, because of the fact that he was not actually under such orders. The court said that "actual military service" means "on an expedition" and should not be extended beyond its true meaning as interpreted by the decisions such as those in the *Drummond* and *Mallery* cases.[27]

Up to the present time few cases have arisen out of informal wills made during World War II. Judging on the basis of those

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[24] 127 Misc. 784,217 N.Y.S.489(1926) *aff'd,* 247 N.Y.580, 161 N.E.190 (1928).
[25] 119 Misc. 9, 194 N.Y.S.909(1922).
[26] 170 Misc. 100, 9 N.Y.S. (2d) 606 (1938), *aff'd* 282 N.Y.606, 25 N.E. (2d) 388 (1940).
[27] *Supra,* notes 12 and 24, respectively.

reported, there seems to be no noticeable change in the interpretation of "actual military service." A New Jersey case [28] held a soldier not within the meaning of the phrase where he had been placed on inactive duty for two weeks immediately following his induction into the army and made his holographic will while at home during this time.

A very recent New York case,[29] found the decedent to be in "actual military service" where he made an informal will after being taken prisoner by the Japanese in the Philippines in 1942 and while in their custody.

The American courts have not as yet given as broad a scope to the meaning of the phrase as that accorded by the English Court in In re *Estate of Spark, supra.* This is probably due to the fact that the occasion to give it such an extension has not yet presented itself in this country, which, unlike England has not been the direct target of intensive military operations by a foreign enemy. Taking the cases cited as a whole, it would seem probable that the American courts and, in particular, those of New York, will today apply the test which requires that the soldier be, at the least, under orders to engage in an expedition before he will be allowed the privilege of the statutory exception in the making of his will.[30]

C. *When is a Sailor in "Actual Naval Service?" When is a Mariner "at Sea?"*

It will be noted that the amendment to Section 16, D.E.L., has altered the wording of the former law to include sailors in actual naval service as well as mariners while at sea. Since naval personnel have always been considered as falling within the category of mariners for the purpose of this testamentary privilege, the significance of the inclusion in terms would appear somewhat uncertain. While the last paragraph of the Section, providing for the time at which service wills shall become ineffective, distinguishes between sailors and mariners for that purpose, the question arises as to whether the courts of New York will apply different tests to the two categories in determining the *time* at which they may *make* nuncupative and holographic wills. Up to the date of the 1942 amendment the same requirements in this respect were imposed on both groups as will be seen in *Matter of Gwin.*[31] Perhaps the legisla-

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[28] 21 N. J. Misc. 473, 34 A. 2d 654(1943).
[29] —Misc—, 76 N.Y.S. (2d)742 (1948).
[30] *Supra,* notes 24 and 25.
[31] 1 Tuck. 44 (N.Y. Surr. Ct. 1865). *See also* note 14, *supra.*

ture in adding "sailors" had in mind the English Soldiers and Sailors Wills Act of 1918,[32] which is specific as to this point by providing that the informal will of a sailor will be given effect if it is made "when he is so circumstanced that if he were a soldier he would be in actual military service." At any rate, the answer to this particular point remains uncertain.

There is no doubt that informal wills made by naval and merchant marine personnel while on the high seas satisfy the demand of the statute that the testator be "at sea." A New York case, *Matter of O'Connor,*[33] is illustrative of this point. There the decedent made an oral will while serving as chief engineer on a ship on the high sea and within two days of reaching port of destination. At the time he was confined to his room by illness. Before reaching port he recovered sufficiently to return to duty, but died on shore a few days after landing. In holding the testator to be a "mariner at sea" the court added that there is no requirement that he be *in extremis* in order that such a will be valid. Thus it seems clear today that there is no such requirement applying to the wills of either mariners or, as already noted, soldiers. Among the numerous reported cases there are several variations both in the position of the testator and of the ship at the time of making a nuncupative will. The following should serve to clarify this point. In *Hubbard v. Hubbard,*[34] decedent was found to have met the statutory requirement where he made his will while serving on board a vessel which lay at anchor at the mouth of Deleware Bay about one mile from the mainland and at a point where the tide ebbed and flowed. But in *Matter of Gwin,*[35] a will was held invalid where the decedent made it on board his ship, a United States gunboat, which was located at the time on the Mississippi River, near Vicksburg. The court in that case said that the "sea" means waters within the ebb and flow of the tides and that the decedent was not "at sea" within this definition. In another early decision, Ex Parte *Thompson,*[36] a nuncupative will was admitted to probate where made by decedent, a cook on board a steamship, while his ship was lying at a wharf in Bremen. In holding that he was entitled to the privilege of nuncupation, the court stressed the facts that the decedent was at the time in actual service on board the

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[32] *Supra,* note 14.
[33] 65 Misc. 403, 121 N.Y.S.903 (1909).
[34] *Supra,* note 20.
[35] *Supra,* note 31.
[36] 4 Bradf. 154 (N.Y. Surr. Ct. 1856).

ship, and that the nature of his service was continuous, not being limited to that particular voyage. This continuity of service has not been urged as requisite to the privilege in later cases,[37] so it would not seem to have been properly essential to this decision.

The courts, generally, have been extremely reluctant to hold a mariner, while on shore, to be within the scope of the statute. An examination of the New York cases reveals no decision overcoming this reluctance. Typical of the New York approach are *Matter of McDonald* [38] and *Matter of Anderson.*[39] In the former case decedent was a mariner who lost his life when his ship was torpedoed and sunk in February, 1942. He made an oral will while A.W.O.L. in New York City before sailing. In holding the attempted will invalid the court said that while courts have been liberal in construing the phrase "mariner while at sea," no construction has gone so far as to validate an informal will made in the circumstances here present. And with respect to the new amendment to Section 16, D.E.L., the court stated that not only has the privilege always been a restricted one, but the 1942 amendment continues the restriction since it must be deemed to have been written in the light of existing case law. The decedent, in the *Anderson* case, was denied the privilege where he made an oral will just prior to sailing for a South American port. He died when his ship was torpedoed in May, 1942. The court rested its decision on the ground that the voyage was considered a safe run, despite war conditions and the remote peril of death by torpedoing.

The proponents of nuncupative wills made in circumstances similar to those of the last two cases usually cite the English case *Goods of Lay,*[40] in support of their position. There the deceased was a seaman belonging to the crew of a ship lying in the port of Buenos Aires. While on shore he was injured and died. His oral will, made while he was *in extremis* was held valid, the court finding him to be "at sea" within the meaning of the English statute. The American courts have not followed this decision.

Before concluding this section, it should be noted that the phrase "at sea" seems to be more restricted in meaning than the phrase "actual military service" in that, while the

[37] *See, infra,* notes 32 and 34.
[38] 179 Misc. 284, 37 N.Y.S. (2d)945 (1942).
[39] 180 Misc. 827, 46 N.Y.S. (2d)128 (1943).
[40] 2 Curt. Ecc. 375, 163 Eng. Rep. 444 (1840).

latter has been interpreted as including a period before entry into battle area, the former has not been interpreted as including any equivalent period.

D. *Other Types of Military Personnel*

There have been very few decisions reported throughout the entire country and none in New York which would indicate in what manner informal testamentary dispositions by members of the Women's Army Corps, Army Nurse Corps, and related branches of the service will be treated under statutes such as Section 16. The reasons for according this testamentary privilege to ordinary soldiers and sailors seem equally applicable in determining whether or not the same privilege should be extended to these various other branches. The military assignments given these types of personnel very often involved overseas duty and the attendant dangers of combat common to soldiers and sailors. And certainly they were afforded no better opportunities or facilities for executing formal attested wills under those circumstances than were the ordinary soldier and sailor. In view of these facts, it may well be that the courts of New York will construe the statute to include them within its scope. As long ago as in World War I the British courts took steps in this direction. A nurse, in In Re *Stanley*,[41] was employed under contract with the British War Office. While on leave in England, but after receiving orders to return to the troop-ship to which she was assigned, she wrote a letter, testamentary in nature, which was admitted to probate as a soldier's will under the English Wills Act. And in *Hale's Goods*,[42] a female typist employed on an ocean liner was held to be "a mariner at sea" under a similar statute.

As to wills made by civilians under contract with the government and working with the army and navy under circumstances in which, if they were soldiers or sailors, they would be in actual military or naval service (*e.g.* combat photographers and journalists, harbor salvage workers, technical advisors, etc.) the above two cases also serve to indicate how they might be handled. While the argument in favor of granting these individuals the privilege may not be as strong as that in favor of members of the W.A.C. and A. N. C., the latter having been made part of the military establishment by act of Congress, yet the courts may stand ready to do so.

[41] [1916] P. 192.
[42] [1915] 2 Ir. R. 362.

II

New Section 16 of the Decedent Estate Law requires that a holographic will, made by a soldier, sailor, or mariner, be "*written entirely in the handwriting of the maker* even though the same be unattested." [43]

It will be noted that prior to the 1942 amendment, Section 16 made no express provision for holographic wills. *Thompson on Wills* states, "These informal wills which soldiers and sailors are permitted to make are frequently called nuncupative wills, but they are not nuncupative in that they are not necessarily oral." [44] However true this statement may have been as applied to the law of other jurisdictions, the New York courts until 1942, insisted that the word "nuncupative" referred exclusively to oral wills. Consequently this provision for holographic wills is an innovation in the law of New York. The eminent Surrogate Wingate in *Matter of Zaiac* [45] advanced, at some length, the argument that holographic wills should have been allowed under the former Section 16. In that case an unattested letter had been offered for probate as the will of a soldier. But the Court of Appeals in reversing [46] held that the will of a soldier, if unwritten, must be subscribed by two witnesses and conform to the other requirements of Section 21, D.E.L., which governs the execution of the ordinary attested will.

Now that the statute expressly provides for holographic wills by service personnel, several problems arise. To be dealt with under this section is the problem of the construction to be placed on the phrase "when written entirely in the handwriting of the maker." An examination of New York cases has revealed no decisions touching on this matter and this may be accounted for by the fact that, unlike several other jurisdictions, notably California and Virginia, New York has not previously made any statutory exception in favor of holographic wills. Frequently, the word "holographic" appears in decisions dealing with wills but it ordinarily denotes a will written in the testator's handwriting but conforming in all respects to the requirements of Section 21 and it is not used to indicate the special

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[43] *Supra*, note 1.
[44] THOMPSON ON WILLS, sec.32 (3rd Ed. 1947).
[45] 162 Misc. 642, 295 N.Y.S.227 (1937).
[46] 279 N.Y. 545, 18 N.E. (2d) 848 (1939).

type of will now provided for by Section 16.[47] Consequently, it is necessary to resort wholly to the decisions of other jurisdictions in considering this problem.

A holographic will is uniformly defined as one that is wholly in the handwriting of the decedent and the statutes of the states which provide for such wills require that they must be *entirely* in the handwriting of the testator.[48]

The following situations and the leading cases dealing with them should be of help in determining just what the word "entirely" signifies when used in such statutes.

A. Disguised handwriting

In *Hannah v. Peake,*[49] the question was whether certain codicils to a will were in the testator's handwriting. The evidence showed that the testator had been very ill at the time of making the codicils and for that reason the writing was not of the same quality as that in the will. The Court held that the codicils were in the testator's handwriting and therefore valid. "Even if a will is written in a disguised hand, as long as it can be proved to have been written wholly by the testator it will be sustained as a valid holograph."

B. Typewriting

In re *Dreyfus' Estate,*[50] the document in question was wholly in typewriting except that the signature was written by decedent in pen and ink. Probate was denied, the court holding that the word "written" as used in the California statute did not include typewriting, which is essentially a process of printing.[51]

C. Use of Rubber Stamp

In re *Thorn's Estate,*[52] the document offered for probate was entirely in decedent's handwriting except for the name of a park inserted with a rubber stamp as part of the description of the land devised. Basing its decision on the *Dreyfus* case, *supra,* the court held that the rubber

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47 Dreyer v. Reisman, 202 N.Y. 476, 96 N.E.90 (1911).
48 *See also* cases collected in 1 PAGE ON WILLS, p.387, note 1 (Lifetime Ed. 1941).
49 9 Ky.133 (1819).
50 175 Cal. 417, 165 Pac. 941 (1917).
51 *E.g.,* Adams' Executrix v. Beaumont, 226 Ky. 311, 10 S.E. (2d)1106 (1928); Langfitt v. Langfitt, 108 W.Va. 466, 151 S.E. 715 (1930).
52 183 Cal. 512, 192 Pac. 19 (1920).

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stamp insertion, not being in testator's handwriting, made the will invalid as a holograph.

D. Use of Lead Pencil or Lead Pencil and Ink

In *Philbrick v. Spangler,*[53] it was decided that a holographic will may be written in lead pencil. And in a case where the document was written partly in pencil and partly in ink, *Musgrave v. Holt,*[54] the court held that inasmuch as it was written entirely in the decedent's handwriting, it was immaterial that both pencil and ink were used.

E. Use of Printed Form

In re *Rand's Estate,*[55] the exordium and first two dispositive clauses of the document offered for probate were printed in the form of a stationer's blank and the vacant spaces were filled in deceased's handwriting. The will was found invalid, the court, in reply to one of proponents contentions, saying that the portion of the paper written by decedent cannot be admitted to probate as his holographic will as that would, in effect, change the statute and make it read that such portions of an instrument as are in the handwriting of the deceased constitute a holographic will.[56]

F. Non-dispositive Matter not in Testator's Handwriting

In re *De Caccia's Estate,*[57] the testator made his will on a paper containing at the top the printed words, "Oakland, California." In holding this to be a valid holograph the court stated that the mere presence of printed matter on stationery used for the purpose of writing a holographic will and which forms no part of the written instrument and to which no reference is directly or indirectly made, will not destroy the effect of such instrument as a holographic will.

In re *Lowrance's Will,*[58] the will began as follows "Will of Mrs. (S. A. Lowrance) made March 2, 1928 (West Center Avenue)." The words in parenthesis were printed. The will was admitted to probate. The reasoning of the

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[53] 15 La. Ann. 46 (1860).
[54] 153 Ark. 355, 240 S.W. 1068 (1922).
[55] 61 Cal. 468 (1882).
[56] *E.g., In re* Bernard's Estate, 197 Cal. 36, 239 Pac. 404 (1925); Billing's Estate, 64 Cal. 427, 1 Pac.701 (1884).
[57] 205 Cal. 719, 273 Pac. 552 (1928).
[58] 199 N.C. 782, 155 S.E. 876 (1930).

court was that when all the words appearing on a paper in the handwriting of the deceased are sufficient, as in the instant case, to constitute a last will and testament, the mere fact that other words appear theron, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to invalidate the will. The printed words are mere surplusage. (It will be noted that the approach in this case is more liberal than that of the *De Caccia* case, *supra.* Had a California Court decided the *Lowrance* case it would probably have denied probate since the "surplusage" theory is not followed in that jurisdiction. California would have asked, "Is the printed matter included directly or indirectly in the provisions of the will?" If so, the court would find the will invalid. The printed matter in the *Lowrance* case was clearly so included although not dispositive in nature.)[59]

G. Dispositive Provisions not in Testator's Handwriting

As to dispositive provisions wholly or partly printed or in writing other than that of the testator, the same tests are applied. Those courts which favor the "surplusage" theory will apply it where possible.[60] The jurisdictions, such as California, which reject that theory are quick to invalidate, as a holographic will, one which includes or incorporates directly or indirectly any printing or writing not that of the testator even though the meaning would remain unaltered by treating such matter as surplusage.[61] Which line of cases New York courts will follow in this matter remains to be seen. There seem to be strong arguments in favor of either position. One thing, however, is reasonably certain; that the general rule stated in *Page on Wills* [62] will be adhered to in New York: "An instrument which is partly written and partly printed cannot be admitted to probate as a holograph, if the written provision is not complete in itself."

H. Incorporation of Other Instruments

"A holograph cannot incorporate another instrument which is not entirely in the handwriting of the testator." [63]

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[59] *E.g.,* Gooch v. Gooch, 134 Va. 21, 113 S.E. 873 (1922).
[60] McMichael v. Bankston, 24 La. Ann. 451 (1872).
[61] *In re* Thorn's Estate, *supra,* note 52.
[62] p. 699 (Lifetime Ed. 1941).
[63] *Ibid.*

This general rule is well illustrated in the case of *Hewes v. Hewes*,[64] where the decedent executed a will in her own handwriting leaving all her property to Smith. On the same day Smith executed a will bequeathing and devising all the property which she might take under the decedent's will. After decedent's death a letter written by her was found. It was testamentary in nature and attempted to incorporate the prior two writings as a part thereof. In holding the letter invalid as a holographic will the court stated the general rule that when an extrinsic document is incorporated into a will by reference, it becomes a part thereof, and went on to say that since the will of Smith was not written by the testator, the testator's will was not entirely in her own handwriting.[65]

I. Interlineations

Generally, interlineations in a holograph after its execution, unless written by the testator, render the will invalid. A leading case dealing with this point is In re *Towle's Estate*,[66] where the instrument offered for probate contained interlineations, additions, and changes incorporated in the provisions of the will, which changes were written by a bank officer under decedent's directions. The document was denied probate because it was not entirely in the testator's handwriting. But the court indicated that if the interlineations had been made by a stranger without the testator's knowledge or consent, the will might have been valid since the changes would have been disregarded.[67]

While the foregoing material has touched on but a few of the possible situations which may arise under the provision for holographic wills now contained in Section 16,[68] it is hoped that it will serve to illustrate some of the possible approaches open to New York courts in construing the phrase, "when written entirely in the handwriting of the maker." *(To be concluded)*

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[64] 110 Misc. 826, 71 So. 4 (1916).

[65] *E.g., In re* Smith's Will, 218 N.C. 161, 10 S.E. (2d) 676 (1940).

[66] 14 Cal. (2d) 261, 93 Pac. (2d) 555 (1939).

[67] *E.g., In re* Thorn's Estate, *supra.*

[68] For further treatment of the subject of soldiers' and sailors' wills see the following: Weiss, "Formalities of Testamentary Execution by Service Personnel," 33 Iowa L. R.; Summers, "Wills of Soldiers and Seamen," 2 Minn. L.R. 261; Atkinson, "Soldiers' and Sailors' Wills," 28 A.B.A.J. 753; Holt, "Soldiers' and Sailors' Wills," 29 Jurid. R. 336; note, 12 Fordham L.R. 80; annotation, 137 A.L.R. 1310.

A FEW COMMENTS ON THE CIVIL DAMAGE ACT

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"The cases are overwhelmingly to the effect that there is no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee." [1] Where public opinion has favored the creation of such means of redress against the vendee, it has been necessary to enact civil damage laws, or dram shop acts. The common law rule is based on the theory that the proximate cause of the injury is the act of the purchaser in drinking the liquor and not the act of the vendor in selling.[2] In *Barboza v. Decas*,[3] the court found for the defendant because "upon this record the plaintiff fails to show any causal connection between the sale of liquor and the damage that he alleged he has sustained." The extent to which this theory has been rejected under the civil damage laws of some states is indicated by the construction given to the New York statute in the recent case of *Gulliver v. Duffy*.[4] The court there held that the "statute requires merely that the defendant shall have caused or contributed to the intoxication, *not that the defendant shall have been negligent or shall have caused or contributed to the injury.*" It seems that in this jurisdiction the civil damage act is in effect a legislative extension of, or more correctly a legislative abrogation of, the doctrine of proximate cause, in cases within its scope. It is the purpose of this comment to examine the case law of this state, and other states having similar statutes, to ascertain the possible consequences of such legislative action.

Since, for such cases to arise, a statute is a *sine qua non*, reference should here be made to a representative statute. Section 16 of the New York Civil Rights Law reads: "Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason

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[1] Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210 (1936).
[2] 48 C.J.S. Intoxicating Liquors §430, and cases there collected.
[3] 311 Mass. 10, 40 N.E.2d 10 (1942).
[4] 77 N.Y.S.2d 637 (1947).

of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication . . . [and] such person shall have the right to recover actual and examplary damages." Unlawful sale, which is the crux of an action maintained under the above statute is defined in Section 65 of the Alcoholic Beverage Control Law as selling, delivering, or giving away alcoholic beverages to any intoxicated person or one actually or apparently under the influence of liquor, to a minor, or to a habitual drunkard.

Similar statutes have been held constitutional.[5] No person has the vested right to engage in the sale of intoxicating liquors.[6] Consequently, the state may "prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic. . . ." [7] The act is undoubtedly a valid exercise of legislative power. It remains to consider the interpretation given to such statutes by the courts.

Unlike some other jurisdictions,[8] New York courts hold that the Civil Damage Act is not penal in nature but rather is remedial, "and while it should not be enlarged, it should be interpreted according to its true intent and meaning, having in view the evil to be remedied and the object to be obtained." [9] Plainly such an attitude can present fascinating possibilities.

The ramifications of the statute, in the light of such broad judicial construction, can be best illustrated by a consideration of some of the cases that have been decided thereunder. *Wilcox v. Conti* [10] is fairly indicative. There the plaintiff sued the bar owner for loss of means of support, alleging that her husband, while intoxicated, was sold liquor on the premises, and the sum of $517 was taken from him by unlawful means, said money being necessary for the plaintiff's support. The court, in hold-

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[5] Bertholf v. O'Reilly, 74 N.Y. 509, 30 Am. Rep. 323 (1878) upholding the constitutionality of similar provisions in the Civil Damage Act, Laws of 1873, c. 646; cases collected 33 C.J. p.519, note 81.

[6] Marks v. Bruckman, 170 Misc. 709, 9 N.Y.S.2d 947 (1939).

[7] Bertholf v. O'Reilly, *supra.*

[8] Ill., Ore. (statute there since repealed).

[9] Wilcox v. Conti, 174 Misc. 230, 20 N.Y.S.2d 106 (1940).

[10] Id.

ing that such a complaint stated sufficient facts to constitute a cause of action, went on to say that the statute makes no distinction between cases in which the loss of means of support is the direct result of the intoxication and those in which it is the remote result thereof. As in an earlier case where the intoxicated person committed suicide while under the influence of alcohol,[11] the court maintained that it is unnecessary to inquire whether the loss of means of support was the natural, reasonable, or probable consequence of the supplying of the liquor. It was enough that the act was committed during intoxication caused in whole or in part by liquor supplied by the defendant in an illegal sale, and that by reason of the act the plaintiff's means of support was affected.

The first Civil Damage Act, passed in the state in 1873,[12] was even harsher, since under that statute the liability was imposed irrespective of whether the sale of liquor was lawful or unlawful. In *Bertholf v. O'Reilly* [13] decided under the first act, the plaintiff's son went on a protracted drinking session during which the defendant sold him liquor. While intoxicated the son killed the plaintiff's horse by overdriving the animal. The essential elements there were considered to be the sale by the defendant contributing to the intoxication and the act of the intoxicated person causing injury to the property of the plaintiff. The lawfulness or the unlawfulness of the sale was of no consequence. Fortunately, the statute as it is now reads in this state has been tempered by time, no liability now attaching unless the sale is unlawful.

Several other recent cases illustrate other aspects of the present statute. In *Tyrrell v. Quigley* [14] the plaintiff alleged that he was assaulted by a female patron of the bar who had been served intoxicating beverages by the defendant or his employee after the woman had become "obstreperous, boisterous, and prone to violent action," and that the defendant and his employee knew the effect of intoxicating beverages upon the patron. Held, the complaint stated a cause of action under section 16 of the Civil Rights Law and section 65 of the Alcoholic Beverage Control Law. In *Scatorchia v. Caputo* [15] the plaintiffs were administrators of a decedent who died of acute

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11 Neu v. McKechnie, 95 N.Y. 632, 47 Am. Rep. 89 (1884).
12 Laws of 1873, c. 646.
13 74 N.Y. 509, 30 Am. Rep. 323 (1878).
14 186 Misc. 972, 60 N.Y.S.2d 821 (1946).
15 263 A.D. 304, 32 N.Y.S.2d 532 (1942).

alcoholism. The decedent was addicted to excessive use of alcohol, to the knowledge of the defendant, and it was alleged that defendant sold alcohol to the decedent unlawfully. The plaintiffs were non-suited, since to allow a cause of action to the estate would be to allow recovery by the party whose intoxication from the illegal sale caused the injury. However, the court did say that under the same facts the decedent's mother and father could have maintained the action.

Two cases, decided under earlier statutes, are still conceivably valid if the element of illegal sale is included. In *Lawson v. Eggleston* [16] the plaintiff's husband became intoxicated and, while in an irrational state, wounded the plaintiff with a gun and then committed suicide. The plaintiff recovered for injury and loss of means of support. The husband had imbibed freely in many different establishments, yet it was held sufficient for recovery that the defendant contributed to the inebriate's program of drinking the village dry. And in *Quinlan v. Welch* [17] an infant daughter was given a cause of action when her father became intoxicated and walked into a moving train with obvious consequences to his health and welfare.

Similar statutes exist or have existed, with variations, in other jurisdictions.[18] The question of the fairness or unfairness of the New York statute in comparison is a matter of individual opinion as to the danger inherent in unregulated sales of alcohol, and the wisdom of protecting society by charging the vendor with such liability. Maine cases hold, for example, that it is immaterial whether the sale is lawful or unlawful,[19] surely an unequivocal approach. An Illinois decision gives a wife a cause of action for loss of means of support when her husband's loss of earning power is a result of his being imprisoned for a crime committed while drunk.[20] South Dakota requires that the intoxication should be the proximate cause of the injury,[21] while other states,[22] like New York, are more liberal to the plaintiff. In Minnesota, if the intoxication sets up functional or systematic disorders resulting eventually in death, the illegal

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[16] 28 A.D. 52, 52 N.Y. Supp. 181 (1898), affirmed without opinion 164 N.Y. 600, 59 N.E. 1124 (1900).

[17] 141 N.Y. 158, 36 N.E. 12 (1894).

[18] Pa., Minn., Neb., N.H., Tex., W. Va., Mich., Vt., Ia., Wis., and Ky., among others.

[19] Currier v. McKee, 99 Me. 364, 59 A. 442 (1904).

[20] Spousta v. Berger, 231 Ill. App. 454.

[21] Garrigan v. Kennedy, 19 S.D. 11, 101 N.W. 1081 (1904).

[22] Kan., Minn., Vt., Neb., among others.

sale is held to be the immediate and direct cause of death.[23] Wilful or unlawful conduct on the part of the inebriate may bar a recovery for loss of means of support in some jurisdictions,[24] as may contributory negligence on the part of the plaintiff.[25] Negligence on the part of the seller is usually not an element of the cause of action, thereby excluding application of the doctrine of foreseeable consequences in many jurisdictions.[26] For the most part, however, illegality of sale is essential for recovery.[27] Many states do not require that liquor be the sole agency.[28] Many states regard the statute as penal and subject it to strict construction.[29] And so on ad infinitum. As liability on the part of the purveyor rests entirely on the statute as written, an extensive discussion of the attitute of other states toward this problem is not deemed practical. It is believed that the above noted cases sufficiently suggest the general pattern.

There are comparatively few cases under the statute in this state. Whether it is because the statute is relatively unknown, or because such cases would be difficult of proof to the satisfaction of a jury cannot be said with any degree of certainty. While the wisdom of the Act may be questioned, its validity is established. The attitude of the courts is generous, and the potentialities would seem far greater than the small amount of litigation indicates.

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[23] Pete v. Lampi, 150 Minn. 423, 185 N.W. 653 (1921).
[24] Sauter v. Anderson, 112 Ill. App. 580.
[25] McDonald v. Casey, 84 Mich. 505, 47 N.W. 1104 (1891); Pearson v. Renfro, 320 Ill. App. 202, 50 N.E.2d 598 (1943).
[26] Hill v. Alexander, 321 Ill. App. 406, 53 N.E.2d 307 (1944), and cases cited therein.
[27] Thamann v. Merritt, 111 Neb. 639, 197 N.W. 413 (1924); cases collected 33 C.J. p.638, note 23.
[28] Janesovsky v. Rothman, 107 Neb. 165, 185 N.W. 411 (1921); cases collected 33 C.J. p.642, note 67.
[29] Hyba v. C. A. Horneman, Inc., 302 Ill. App. 143, 23 N.E.2d 564 (1939); cases collected 33 C.J. p. 637, note 94.

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